AN EXACT.

ABRIDGMENT

OF

The *Commentaries*, or *Reports* of the Learned and Famous Lawyer,

EDMOND PLOWDEN,

An Apprentice of the Common Law.

Concerning divers Cases and Matters in Law, and the Arguments thereupon; in the times of the Reignes of King *Edward* the Sixth, Queen *Mary*, King *Philip* and Queen *Mary*, and Queen *Elizabeth*; with the Exceptions to the pleadings, and Answers thereunto; the Resolution of the Matters in Law, and all other principall Matters arising upon the same.

Digested by Sir *John Walter* Knight, late Lord Cheif Baron of the Court of *Exchequer*.

Englished by Fabian Hicks *of the Inner Temple London*, Esq;

Tractant fabrilia fabri.

London, Printed by *J. Streater* for *Henry Twiford*, and are to be sold at his Shop in Vine-Court in the Middle Temple, 1659.

Rec. Oct. 27, 1892

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A.

B.

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T H

THE FIRST PART.

Reniger *against* Fogassa.

An Information by Reniger, *against* Fogassa, *upon the Statute of* 1. Ed. 6. *cap.* 13.

Fogassa shipped 4500 Kintals of Woad for *England*, and upon the sea a tempest did arise, and endanger the drowning of the ship; for the safety whereof, and of the men and goods in it, he casts part of the Woad to the sea; and after arrives at the Port with the residue; and before the landing, *Fogassa* came to the Collector of the Custome and Subsidie, and shewed unto him the accident aforesaid, and that by reason thereof, he knew not the certainty of the remnant, and prayed him to make entry of 2000 Kintals of Woad, which he supposed were left; and if more were remaining, then he would pay Custom for it according to the rate when the certainty should appear; desired licence for to land it, which was granted; and before the Woad was weighed, *Reniger* informed against him for landing 1693 Kintals of woad more then 4500 Kintals the Subsidie not paid, nor the Collector agreed with for it; to which he pleaded the matter aforesaid, and concluded, &, *super hoc*, he did agree, and upon the agreement Issue was taken, and the defendant gave in evidence, the especiall agree-

2. E. 6. in the Exchequer Chamber.

agreement aforesaid, and, upon the evidence, th
King Demurs, and adjudged for *Fogassa* the Defe
dant, by force of a privy Seal sent by the King
that purpose. But the opinion of all the Justices a
Barons, except *Hales* and *Montague*, were with th
Defendant.

1. For that this agreement *incertain*, and *condi
onal*, is an agreement, and so saith the words of th
Statute, which sufficeth, because the Statute is p
nal, and shall be expounded strictly against offe
ders, and shall not be intended beneficial for t
King to be an agreement.

2. Admit it to be an Agreement, yet here th
incertainty is reducible to a *certainty*, by circumsta
ces, *viz.* by weighing, which shall be done by t
Collector at his pleasure.

3. Admit that the agreement ought to be *cert*
at first, yet here the casting out of the woad for
avoiding of greater mischief, *viz.* the drowning
the ship, men, and goods, the necessity for the a
ding of eminent danger of death, the compul
for fear of death, caused his ignorance to be *in
luntary*, and, by consequence, his agreement *incert*
every one of which by it self, may dispence with
law, *à fortiori*, altogether.

4. When the defendant pleads a *special agree*
in the Affirmative, and concludes upon it, *& s
hoc* agreement, the conclusion hath not waved
matter aforesaid, as if it had been in the N
tive.

5. He had performed the intent of the Statute
this agreement; for when the Collector hath w
ed the woad, that he may do his pleasure, then
King shall have an action upon the agreement;
if he doth not weigh, it is the folly of the C
ctor.

Gri

Griffith, the Kings Sollicitor. Agreement, or concord executed with satisfaction in deed, or with accord, or means for recovery of recompence, is a good bar in Trespass: Executory is not; howbeit, it is the mutual assent of the partyes, because it giveth neither recompence, action, nor remedy whereby to obtain recompence; and therefore it is not but void communication, and *nudum pactum*, as in 30. *H.* 6. In Trespass the Defendant pleads concord between them, That he shall pay 20. s. to the Plaintiff at a day to come; it is not a bar, because it is not satisfaction, nor recompence for it, because he shall not have debt after the day, so 9 *E.* 4. 19. in Trespass upon 5. *R.* 2. Defendant pleads accord, That the Plantiff should re-enter, and have the land, and that the Defendant deliver to the Plaintiff all the Evidences concerning the land; and said that the Plantiff had entred, and that he had delivered all the evidences unto him; It is no Bar, for it intends the proper evidences of the Plantiff, and so no satisfaction of the wrong, but if it conveys him Title to the evidence, then it is a good bar, as in 15 *H.* 6. in Trespass against him by the Plaintiff, he pleads, That they agree, that if the Defendant doth his endeavour for to agree them for a Trespass by the Plantiff to *S.* That then, *&c.* and saith, *That he did his endeavour, so that they are accorded*: it is no plea, because no satisfaction; but if he saith, *That he hath accorded them at his own costs*, it is a good bar. 5.

Gawdy the elder, for the defendant. Arbitrement, which is Executory, 9. *E.* 4. 51. *Fitz. H.* 4. 3. Accord is a good bar in Trespass, because he may have debt at the day appointed for the payment of the summ agreed to be paid in recompence, and so the Trespass is converted into another thing, 6.

See the case agreeing hereto in F. 19, *E* 4. fol. 9. *and* Fitzherb. *Abridgment under the title Accord.*

6. Fitzh. Abr. *title Accord* 1.

viz. Debt by the Arbitrators, which are judges of it: and so accord countervails satisfaction *in facto*; otherwise, it is of a concord executory, 6 *H.* 7. 11. because the pleading of the concord confesseth a wrong, and it is not reason that the Plantiff in an action thereupon, should be barred without satisfaction. And so shall the King be satisfied here. Also in concord the wrong to be recompenced must precede the agreement, but here the agreement precedes the wrong supposed, and cometh not after the wrong, as in concord; and therefore this case may not be resembled to the case before of Accord. *Incertainty* at the beginning which may be reduced to *certaintie* by matter *ex post facto*, countervaileth *certainty*, *ab initio*; as where a man leaseth all his Acres in D. paying for every one 12. *d.* it is a good reservation, because when the Acres are measured, the Rent shall be *certain*; so a gift of two Acres, of the one for Life, and of the other in Fee, by the *Feoffment*, of the one he shall have Fee in this *ab initio*: so *Lessee* of *White-acre* and *Black acre* for life: the remainder of the one in Fee, to a stranger, and the *Lessor* licences him for to cut Trees in *White-acre*: now he shall be adjudged to have the remainder of this Acre, *ab initio*; so the thing which at the commencement was *incertain*, is made *certain*. So in *Wheelers* case, 14. *H.* 8. 17. So Lease for so many years as I. S. shall name, is good when he shall name the years. So 17. *E.* 4. 1; *A.* bargains that *B.* shall have his wheat when he hath viewed it, if he please, paying 4. *s.* the Acre; it is a good contract, if he paies when he carrieth it away, yet the quantity and summ incertain at the first; here, when the Collector hath weighed the wool. And therefore this conditional agreement doth countervail an agreement *certain* at the beginning. And where acts ought to be performed strictly,

n divers cases the performance of the intent, & not he words are good, for it countervaileth the per= ormance of the words: So here. But performance f the words, and not of the intent, is not good: as it. fol. 182. of conditions upon a *Feoffment*, for to ive again to *I. S.* and his wife in speciall Tail, nd they die, and the *Feoffees* make an estate to their ssue, and the heirs of his father and mother, this is ood, because the intent of the condition is perfor= ned. So 17. *E.* 4. 3. Obligation upon condition to 7. nfeoff *I. S.* and he lease for years, and Release in ee, it is a good performance, and a good *Feoffment*, nd yet the words of a condition shall be performed s strictly as a Statute.

Bradshaw the Kings Attorney. The mutual assent f the parties upon a thing incertain, is in Law but a ain communication before the certainty known, as n 37. *H.* 6. 8. A man promises in marriage with his aughter so much as *I. S.* shall arbitrate. The party which shall marry his daughter shall not have it, if e marry her, until *I. S.* hath made his award, and ap= ointed it; for before that it is reduced into certain= y, it is but a vain communication. So in 20. *H.* 6. A an Leases to *A.* for so many years as *B.* shall name, e cannot enter into the Land, before that *B.* hath amed the number of years; and the witnesse of he Defendant, which saith, That he found sureties, nd hath not shewed who, or what, as he ought, is anting both in the name and ability of the ureties, which the Court ought to adjudge of, as *Vide H.* n 22. *E.* 4. 40. A man that was bound to shew a 22. *E.* 4. *fol.* fficient discharge of an annuity, pleaded, that 40. e had offered to shew it to him, and he refused o see it, and held no good plea. Agreement ccording to the Statute in issue shall be intended eneral; *viz.* certain, and special, *viz.* incertain

evidence proves not the issue, neither is it pursu
to the issue; as in 31. *H.* 6. Upon *non est fact*
pleaded in debt, witnesses say, That it was deliver
at another place than it did bear date, whereup
the Defendant demurred, and the Plantiff was ba
ed, because this proved it not to be his Deed; f
the delivery shall be intended where it was date
and, the witnesses proving the contrary, the e
dence warrants not the issue; so in 18 H. 6. 1
One deed of Lease for life without Livery given
evidence, shall not maintain upon Free-hold, ple
ed by the issue; so in 14 *E.* 3. Upon traverse o
T. 18. H. 6. *fol.* 16. *et* Fitzh. *abr.* 101. gift in Tail, the witnesses prove that another m
the gift, and thereupon it was awarded that t
Plantiff should be barred, so if he had pleaded t
general agreement in bar, and special in the rejoy
der, it is a departure in pleading, as in 6 H. 7.
In Trespass the Defendant pleaded a descent
him; and the Plantiff said, That after, the Dese
dant infeoffed him; and the Defendant said, Th
it was upon condition, and for breach thereof
entred; this is a departure from the Bar, for it i
8. new matter. For the same reason a special agre
ment in evidence shall not maintain the gene
issue; one witness is not enough, nor one Juror,
to try an issue, if more were warned by the Sheri
8 *E.* 3. 50. So here the Defendant had but o
witnesse which proves for him, which is not su
ent, and so judgment should be given for the Ki

Atkins for the Defendant. A witnesse produc
to prove a thing, if he saith, That he knoweth n
thing of the matter, his deposition is void; so,
he depose negatively, as to say, No more was enn
then so much; so if one single witnesse be not
nough, when a man having foure and three
them returned upon his own enquest: if the ot

ne be not a good teſtimony, conſidering the know-
edge of the Jurors, the Law brings upon him a
rand miſcheife: ſo it is not needfull to aver that
hich of neceſſity muſt be intended, as that the
King hath a beame there: ſpeciall agreement is an
greement, as a Feoffment upon condition is a Fe-
ffment, and ſo this word *Agreement*, includes eve-
y agreement, by which the evidence well main-
ains the iſſue. The Statute ſpeaks not of ſurety,
nd peradventure intends it not, and therefore in
vain to ſpeak of it; and therefore it may be, he
hath not anſwered to this exception. Agreement
in our Law is threefold, *viz.* Executed at the be-
ginning of it, with payments intended, mentioned
in the Statute of 25. *E.* 3. *cap.* 3. which ſaith,

Three manner of Agreements in our Law.

1. *That goods bought by fore-ſtallers, are forfeited to the King*, if the buyer had made agreement with the ſeller; ſuch agreement is not meant in our caſe, becauſe then the Statute ſhould not be intended in the disjunctive; for then the firſt, and the ſecond clauſe ſhould be all one: but the word, [*Or*] diſ-joyns the clauſes; and the agreement is with intent to pay for the things.

2. Agreement is to an act made by another, as in 20 *E.* 4. 9. To agree to a diſſeiſin to his uſe, maketh him a diſſeiſor from the beginning: ſo the party ravi ſhed, to agree to the raviſher, is an agreement executed here, becauſe nothing is to be done afterwards, and agreement here may not be an executory agreement, becauſe the performance ſhall be afterwards; yet both parties accord at one time before.

3. The third agreement is when two perſons at one time agree, that ſuch a thing ſhall be done in *futuro*, this agreement is executory becauſe the thing muſt be done afterwards, and therefore, 16.

H. 8. cap. 3. intends such, because it speaks of payment, or agreement for first fruits, *&c.* and common usage to pay after, upon obligation made before, proves this, which intends agreement executory; and here agreement is intended executory, because it is not the first, nor the second; and an agreement executory, is *Duplex*, the one certain at the beginning, as this of first fruits; the other by matter *ex post facto*, upon certainty to be known, as here; and such agreement executory, the Statute will warrant; for no Law will punish him, in whom there is no default, and where he cannot prevent the mischance by no possibility, for the necessity of the matter, and for that inevitable chance shall not prejudice any: 20 *H.* 7. 11. *Fineux*: A man by the Common Law may kill another in his own defence, or as a Champion, for the necessary safeguard of his life, and the Tryal of right; so notwithstanding the custom of the Realm, new *Natura brevium*, 94. *b.* If enemies of the King steal o
10. Guests in an Inne, the Hostler is discharged, because he cannot resist. So if the ship were on fire, the casting of the goods on the land without payment, or agreement for the Subsidie, shall excuse the Defendant; so here the extremity of the Tempest, doth excuse the rigor of the Statute.

Sanders, The Kings Serjeant. Notwithstanding that an agreement conditional is included in the words of the Statute, *viz.* *The Collector not agreed with*, yet every Statute, although it be penal, shall be taken as the makers intended, for the Statute of Wast, is; *If any make wast in Lands which he holdeth by Demise*, &c. yet if his Estate be *Ex legatione*, it shall be punishable in wast; and yet the

he Statute gives *Ex demiſſione* onely, and ſo
is holden, 10 *H.* 6. 8. But *Gloucester*, *cap.* 5.
. *cap.* 14 *nor Marlebridge*, *cap.* 13. *ſpeaks no-* M. 10 *H.* 6.
ing de demiſſione. So, *quia emptores terrarum*, viz, 8. Fitzh.
. 3. *ſpeaks ſecundum quantitatem terræ intend. valo-* *ab. tit.*
. So 4 *E.* 4. 12. An information for ſhipping *breif.* 63.
Wooll without ſureties, according to the 14 *E.* 3.
he laſt chapter of carrying Bullion holden good,
ecauſe the finding of ſureties is not repealed by
he general words of 36 of *E.* 3. *cap.* 11. which
iveth the old cuſtom of half a Mark for every
ack after three years, nor of 45. *E.* 3. *cap.* 4.
hich impoſeth no charge upon Wooll, other then
uſtom, and Subſidie granted to the King, and
ithout aſſent of Parliament; and the two laſt Stat.
tend not for to diſcharge Bullion, but great Sub-
dies upon Wooll after 3. years; ſo that the mind &
tent of the makers ſhall expound the general, and
oubtfull words of Stat. and abridge the generality
fthem: ſo here it ſhall be intended an agreement
ertain. Alſo becauſe the Commons pray the
ing, That he will be pleaſed to accept of their
rant, for that the words of the Statute, which is
eir Grant, ſhall be taken more beneficial for the
ing, and moſt ſtrong againſt the Grantors, ac- 11.
rding to the Principle of the Common Law, in
ſe of a common perſon. So the Statute of *Prero-*
ativa Regis, 17 *Ed:* 2. *Raſtal*, *Wards* 13. is the
rant of the Commons to the King, which ſaith,
he King ſhall have the cuſtody of all the Lands
ſuch which hold of him by *Knights ſervice in Ca-*
te, whereof the Tenants were ſeized in their
emeaſne, as of fee at the day of their death, of
homſoever they hold alſo by like *Knights Service*,
nd notwithſtanding that *Fee* is commonly taken
be *Fee-Simple*, yet the King ſhall have of *Tail*, be-
cauſe

cause it shall be construed most strongly for the
where it hath two intendments. Agreements upo
which the Common Law giveth no remedy, a
void; and not good, as in 19. *H.* 6. 36. Up-
M. 19. *H.* 6. *fol.* 36. on an information for the forging of false Deed
the Defendant pleads Arbitrement made, *viz.*
That the Plantiff shall not farther prosecute h
Writ against the Defendant; and saith also, Th
the Defendant shall be *non-suited* in the Assize
This is no Plea, because *non suited* sounds not
satisfaction, and cannot compell him to be *no*
suited: for the award is not good, if it be not ex
cuted wholly, or the thing awarded may be rec
M. 6. *H.* 7. *fol.* 10. vered by action; and therefore in 6. *H.* 7. 10.
Tresp̃as, to say, That he hath paid money, but
hath not made his windows, which the Heir m
compel him to do, for the concord is intire,
wants execution in all; and indeed before acti
brought, is not good, then it is performed,
not immediately, and therefore it was held
Plea. So in 6. 27. *ass.* *pl.* 5. A Baily known
Lib. assist. fol. 5. *to pledge.* the Ox of his Master for Wheat, and if he p
not, *&c.* he shall keep the Ox alwayes. This sh
bind the Master, because the wheat cometh
his use; otherwise not, because he had no reco
pence. So in 17. *E.* 4. 1. In Tresp̃as for the
king of wheat, the Defendant pleads, That
Plantiff sold it, if he liked it upon view, he sho
have it, paying 40. d. and afterwards he saw it,
ked it, and took it; this is no good justificatio
because he doth not alledge payment, so here.
contracts conditional are good, when they are p
formed; but before performance, they are o
communications.

Brook, Recorder of *London*, for the Defend
Where matters are to be tryed in the Civil L
th

there ought to be two witnesses, here not necessary; For where tryal is by twelve men, because the Inquest may give a precise Verdict, where there is no Testimony, or Verdict, or Evidence, or the Evidence seems to be contrary to the Witnesses, as in 14. *H.* 7. 2. *the Inquest* acquit one indicted of murther; he is arraigned, and acquitt; *the Jury* shall say, *Who killed him?* although they have no witnesses, and so witnesses are not necessary, but where the matter is to be tryed by witnesses onely; for if the witnesses were so necessary, then it would ensue, That the Jurors should not give their Verdict contrary to the witnesses, where the Law is meerly contrary; for when witnesses for tryal of the Fact joyn with the Jury, if they cannot agree with the Jurors, the Verdict of the 12. shall be taken, and the witnesses rejected; wherefore this point is clear enough. And as to this which hath been said by *Bradshaw*, That the deposition of *Da.* will make against us; for that he saith, That *S.* shewed to him, that the entry was not made for more then 2000. Kintals: Sir, this saying is nothing to the purpose, for if he cannot say something to prove the issue, in which he cometh to depose, then it is neither with us, nor against us, but it is of the same effect in Law, as if he had said nothing, or that he knew not of the matter; and so this point is also clear enough. And as to that which hath been moved also by Mr. *Attorney*; That he ought to shew what rate is certain: Sir, this needs not here, because it is expressed in the Statute, 12. d. of every 20. s. and of generall Statutes every one shall take notice. And he argued further and said; That the agreement here shall be good, and is within the intent of the Statute; for in many Cases, Gifts, and Grants made, will not be certain at the beginning, and yet shall

be

be good, for that there is a mean to reduce them afterwards to certainty, and yet the nature of Gifts and Grants is to be executed presently, and every Gift is an agreement between the parties, and so is every Grant; and then if Gifts and Grants, (which are also agreements, and the nature of which is to be executed properly at the time of the making of them,) it shall be good, notwithstanding they are incertain at the beginning *à fortiori*. Agreements Executory of things shall be good, where they are incertain at the first, and to prove that such Gifts, and Grants shall be good, notwithstanding their incertainty at the first, there are many Cases; and therefore if the King at this day grant over certain Lands, which have come to his hands before, and Grant over to the Grantee such Liberties, Privileges, and Jurisdictions, howbeit that the King knoweth not the certainty of the Liberties, *&c.* yet the Grant is good. So in 8. *H.* 6. 27. The King Grants to the Dutches of *York* an Island, with all Issues and Amerciaments, *&c.* there it is holden that the grant is good, yet the King knew not what Issues, or what Amerciaments shall be afterwards forfeited; but for that, that when they shall be forfeit, they will be certainly known, and so hath a means to know the certainty of them; this is the cause that the Grant shall be good. And so in 5. *E.* 4. *the King* Granted to one called *Garter*, the Office of *the King of Heralds, cum feodis & proficuis ab antiquo*, &c. There this Grant 13. purports an uncertainty of the Fees, and Profits belonging to it, and yet it is held good. And so in 30. *H.* 6. The King Grants all such lands as came to him by Attainder, *&c.* it is good; although it comprehend no certainty, but may be reduced to a certainty. And so if the King will pardon all Riots, *Pardon is good*

how

owbeit, it comprehends no certainty. 21. *H.* 43. A Parson grants to me his Tythe-wooll he next year, or perquisites of his Court, he Grants are good. So *Perkins* 17. Feoffment of two Acres, to hold the one for life, the other in Fee, without saying he shall have ee; if he lose both by default, he may have *Quod ei deforceat* for the one, and Writ of right for the other. So if one grant a rent-charge to nother, the Grantee may avow, or have a Writ of nnuity. So in 9. *E.* 4. 36. *per Litt.* Grant 20. s. r a garment, good, because certain by the will of he Grantor. So a Lease for so many years, as *I. S.* all name, is good. So *Perkins* Fol. 17. If I have black and white Horse, and I give one of them *I. S.* this gift is good, for that the certainty will e known by the election of the Donee. And although it is not concluded who shall weigh, and hen, yet it is good, because there is an Officer in very Port which keeps a Beam, and ought to eigh. And although the Statute do speak of an greement certain, yet Law, the reason alwayes xempts something out of the prohibition of the ords of Statutes, as 15. *H.* 7. 2. by *Keble*, A risoner which breaketh Prison, by the words of he Statute is a Felon; but if he break it when it s on fire, nor. So † 14. *H.* 7. 29. *Stamford*, 25. *cap.* . Jurors severed by a great Tempest, shall not be merced, and their Verdict good. So *W.* 2. *ap.* 3. gives not to a Fem Covert, *Receipt*, but where the wife is ready to answer, yet the wife reeived by prayer in aid or vouching. 20. *H.* 6. 48. nd there she is received, where she is not ready to nswer, because otherwise she shall lose *the ecompence* by *warranty*. So *W.* 2. *cap.* 1. say, That

Perkins 17. *Grants.*

Littlet. rents 7. 9. *E.* 4. *fol.* 37. *Term. M.*

† 14. *H.* 7. *fol.* 27.

That *Dones* ſhall not alien; yet 5. *E.* 2. is intended of their Iſſues; ſo here, for to avoid miſchiefs *&c.*

14. *Harris* the Kings Serjeant, to the contrary. And he argued as the Kings Attorney did, that is to ſay That the evidence which proves the agreement upon condition, warrants not the iſſue, which ſhall be intended a generall agreement; as if the Defendant in Treſpaſſe plead not guilty, and give a licence in evidence, or in *formedon in diſcender*, upon a gift in free marriage: if the gift is traverſed, and a Deed is ſhewed of the gift in free Marriage, *the Remainder* over in Fee, or upon traverſe of a Leaſe for years, alleadged without Deed, and the Deed is ſhewed in evidence, this evidence warrants not the iſſue: So here an agreement conditionall maintains not the generall agreement intended in iſſue; for the Collector could not agree to let Merchandize be landed, the ſubſidy and cuſtom unpaid, becauſe the Statutes ſpeaks ſo expreſly as if a Baily pay the debts of his Maſter, he ſhall not be allowed for this in his accompt, without ſpecialty; but if he pay Quit-Rents, iſſuing out of the Land, he ſhall be allowed for this, for that the payment of this belongeth to this Office. And ſo if the Collector accept another Agreement than is intended by the Statue, this ſhall not help the party; and ſaid, that agreement upon condition ought to be performed, before it be pleaded as if I give all the money in my purſe to *I. S.* he cannot have his action for it, except that he alleage the certainty of it; So here: wherefore judgment ſhall be given for the King.

Pollard, Serjeant for the Defendant. An agreement upon condition, is an agreement; as a Feoffment upon condition, is a Feoffment; and incl-

ed in words of the issue, (that is to say) in this ord *Agreement*, which contaimes every agreement. o, 36, *H.* 6. 2. In debt upon a Recognisance, and he Defendant saith, That there is no such Re-ognisance, whereupon they were at issue, and at he day, *&c.* a Recognisance with condition was ertified, & held good, and that he had not failed of he Record, because a Recognisance upon condition s held to be a Recognis. nce. So here, the agree-ent generall was put in issue, the which shall be ntended the more common agreement, and this is he generall agreement, and the evidence given by *Y.* proves a special agreement, *viz.* an agreement pon condition which is other then the agreement endred by the issue; & therefore the Demurrer shall e adjudged for the King, and Informer. Sir, as o this I answer; That by the argmuments made efore, nothing hath been put in issue, but if they gree according to the Statute; so here: admitting hat the agreement general had been in issue, but he especial is: The especial matter, *viz.* Tempest, *& super hoc agreavit*, are in the affirmative, and ay stand together; and therefore both remain as ne entire matter, and substance of the issue. As the Tenant pleads speciall Bastardy against the laintiff, *in mort D'ancestor*, and alleadge this ncertain, as he ought, *viz.* That the Plaintiff was ngendred between *I.* and *A.* and born before mar-iage, & then they marry and conclude as he ought, nd so Bastard; This conclusion hath not avoided he special matter before; for if so, then it should be astard generally, and triable by the Bishop, and hen shall be by him certified *Mulier*, because such is *mulier* in the law spiritual, but shall be tried here y Assize; and therefore the special matter remains, nd the issue is taken thereupon. So 3. *H.* 7. 5. by

15.

Keble.

Keble. One counts of a gift *in Formedon*, and bein demandant, maintaines it by recovery in value, b reason of a Warranty; and so gave. The Tena ought not to traverse *the conclusion, viz.* as he shou do if he had avoided the special matter before, be cause it is matter in fact, triable by the Countrey but he ought to answer to the recovery, triable b Record, which proves, That the speciall matte before the conclusion shall remain. So, 32. *H.* 6, 14 by *Litl.* If the Plaintiff in Assize makes to himsel a Title, and concludes, and so he was seised until by the Defendant disseised; now if this conclusio hath avoided the speciall matter before, then ensueth that the Defendant cannot answer to th Title; but the Law is, That he ought to answer t the Title, and traverse it; by which it is proved that the conclusion hath not avoided the speci matter before: and in all these cases, the matter be fore the conclusion, and the conclusion, are in th Affirmative; as in Debt, the Defendant plead payment, and so ows nothing; and in Trespas the Defendant pleads a gift of the goods, and not guilty: when it is agreed between any, Th a principall thing shall be done or had; and befor that this may be done or had, there is another thi first to be done, which is not certainly agreed wh shall do the other thing; the Law appoints hi who hath the most skill, to do the said othe thing, So 9. *E.* 4. 4. One is bound to make th great Bell of *M.* tunable with the other Bels; the in that case to say in Debt by obligation, That th Bell was not weighed, judgment if action is n Plea; because in construction of the Law he sha weigh it, for it belongeth to his Office. So a Ta lor, bound to make a gown, shall shape the clot So here the Collector in behalf of the King, sha have the subsidie which is the principal thing; an

ther

therefore he shall weigh, for it belongeth to his Office to try the certainty, for without certainty the King may not be satisfied. And in Trespass, because that he justifies the necessary circumstance and mean, or hath Title to the principal thing; as 1. *R.* 2. *Fitz. Bar.* 333. and *Perkins, fol.* 23. He may cut and carry trees granted to him, and justifie it, although the grass is spoiled by it. So one may take Fishes in a Pond with Nets, and justifie it; but if he dig a Trench to drain out the water, not. A Collector may weigh when he pleases; for where one shall have benefit upon the first act to be done by him, and no time is limited when he shall do it; the Law saith, That it shall be done at his pleasure: So the Mortgage shall pay when he pleaseth, when no time is limited; so one may marry the daughter of *A.* when he pleaseth, if no time be limited: so in the principal case, for as much as payment shall be made to the Collector upon the weighing, and no time is limited for the weighing, the Law refers the time of it to the will of the Collector, and so the agreement is good and perfect. 16.

3. *H.* 7. 11. The Sheriff takes *A.* by *Capias*, now he doth well, but if he return *non est inventus*, then he shall be a Trespasser *ab initio*; but here the not weighing, because the King refers this to the Collector in the behalf of the King, in his default the agreement shall not be made void *ab initio*, in prejudice of the Defendant, which before was good, notwithstanding that the agreement speciall is an agreement, as *Sanders* confesseth; yet it shall be construed best, *viz.* generall for the King, as he urged. The rules of the Common Law in the construction of Statutes, are such that Statutes Penall shall be taken and restrained to their generall words, favourably, and to the benefit, and not 17.

prejudice of him against whom the pain is inflicted, and shall not extend farther then the words, as *W.* 2. *cap.* 40. saith, where the husband aliens the land of his wife, *quod secta mulieris non differatur &c. per minorem ætatem hæredis, qui warrantizare debet,* and saith not the Heir of the husband, nor of a stranger, but onely the generall word, heir; yet 18. *E.* 4. 16. and 17. *E.* 4. 59. *&* *post* 47. the parol Demur, *in cui in vita per nonag* of the second vouchee, because he was not heir to the husband, and so because penal, *here in favor of him it is restrained* to the heir of the husband onely: So by *W.* 2. *cap.* 11. an accomptant found in arrearages, shall be imprisoned by Auditors, and saith not when; but yet in 27. *H.* 6. 8; In debt for arrearages of accompt, it is adjudged, That if the Auditors do not commit the accomptant to prison presently after the accompt, and therefore the generality of time is restrained to a particularity, by the rule of the Common Law in construction of Statutes, and also by the intent of the makers; so if the scope and end of the matter is satisfied, as the mater, and intent of the matter, is accomplished; and the scope of the Statute here was, That the King shall have the Subsidie; and the agreement here sufficeth for that, because it authorizeth the King to weigh Woad by the Collector when he pleaseth, and then the King hath Title of Action and so the surety of the King thereby is referred to will. Also such agreement hath been allowed upon the same words of former Statutes for Subsidies. Also if the Statute had expressed the agreement in certain, yet agreement uncertain should have been good here, and out of the penalty; because one may infringe the words of the Law, without infringing the intent of the Law; for up

on some accidents, the law priviledgeth some things done against the words of the Law of Nature, of the Law of this Realm, and of other Realms, and the Law of God: *viz.* First, for to avoid greater inconveniencies. Secondly, for necessity. Thirdly, by compulsion. Fourthly, by involuntary ignorance. First, for the avoiding of greater inconveniences; as † 22. *ass. pl* 56 where a man of *non-sane memory*, and in his rage did great hurt; and another man and his parents took him, bound him, and beat him with rods; and here it is holden that they might justifie this in avoidance of greater damage, being of *non sane memory*; and yet the Law of nature, and of the Realm prohibites battery but this particular case for the avoiding of greater mischief, hath one exception, and special priviledge. So 1 *H* 6. 7. The Lord (contrary to the † Statute of *Marlebridge*,) may lead the Distress from the Land into another Country where the Mannor is; for it should be prejudicial to the Lord, if he should not carry the distress to his Manor. Amongst the Romans they had a Law, That every one which should scale the walls in the night, should be condemned to death; and one in the night did scale the walls in the time of War, to discry enemies to the Romans, and he by the judgment of the Senate was not only discharged, but had a reward therefore; so such interpreting of Laws, is a tempering of the rigor of the Law. Secondly, *necessitas non habet legem*; and therefore it is a good excuse in every Law, as 38. *H.* 6. 11. Increasing of water excuseth a default in a *præcipe quod redeat*, because he could not appear without danger of death; yet the Law abhors every default, because it is in contempt of the Court: So *David* did eat the shewbread for necessity, although prohibited by the

† *Lib. Ass.* 22. *pl.* 66.

† *Stat. of* Marlbridge.

38 *H.* 6. *fol.* 11.

Law of God. Thirdly, compulsion excuses in ev
Law, as the avoiding of an obligation made by *du*
resse: So if the arm of any man is drawn by compul
sion, and a weapon in his hand kill another, th
shall not be Felony, nor he damnified, because h
did it by compulsion. Fourthly, involuntary ig
norance doth excuse: as 3. *H.* 7. 1. *Kel. fol.* 26
An infant killeth another, it is not Felony, becau
he hath not discretion, and it shall be imputed t
his ignorance, which is involuntary by compulsio
of nature, & so no default in him. So *Fitz. Nat. b.*
202. *b.* if one of *non-sane memory* kill another b
cause his ignorance by compulsion, *viz.* the hand
God, and such other things done by ignorance, b
cause not to be resisted, and this involuntary ign
rance is cause of the Act; therefore he, whi
kills another by involuntary ignorance, *As by t*
fall of a hatchet out of his hand, shall have Sanctua
Deut. 19. But ignorance voluntary is not pri
ledged; as if a man that is drunk killeth anothe
because this ignorance cometh by his own act an
folly, which he might have resisted; therefore
shall not be privileged, because he himself was t
cause of such ignorance. If then, in any one of t
aforesaid four cases, the Law is not infringed; th
a multò fortiori here in this case, where all fo
meet together, and were the causes of the inc
tainty of the agreement here: And therefore, in
much as the Statute saith, *The Collector's not agre*
with, and so gives him authority to agree with the C
lector, and the Defendant hath made a special agr
ment with him, which is an agreement, and so with
the words of the Statute; it seemeth that by t
rules of the Common Law used in construction
Statutes, by the intent of the makers, and by
reason and equity it shall be adjudged, a suffici
agr

ent, and warranted by the Statute; and there-
re demanded judgment against the King, and so
was adjudged: But all the Judges were of opini-
against the King, onely *Hales* and *Montague*;
d afterwards the King sent his Privy Seal.

Colthirst *against* Bejushin.

IN Trespass, the Defendant pleads a Lease for 23.
life to *H. B.* and *E.* his Wife remainder to his Tr. 3. E.
n *W.* for his life *si ipse habitaret, & residens esset*, 6. *in the*
and upon the aforesaid Grange and Farm; and *Common*
he should dye in the life time of *H.* and *E.* then *Pleas.*
remain to *E.* the Defendant for his life; if he
so would inhabite there during the Term afore-
id, and saith, That *W.* did dye in the life of *H.*
nd *E.* and after *H.* and *E.* dyed also, and the
id *B.* now Defendant, entred without shewing
certain when, and took averment that he had in-
abited there alwaies after his entry, and upon this
lea, the Plaintiff Demurs; and it was adjudged a-
inst him for the Defendant.

1. For that the averment of his continual resi-
ence, is surplusage; and therefore the incer-
inty thereof *nil refert*. By *Harris*, *Hinde*, and *Mon-*
ague.

2. It is not a condition compulsory, but a thing
ligible, at the discretion of the Defendant, (by
Montague) and then his entry is not material, but
s his pleasure.

3. Admitting that it be a condition, yet it is
ubsequent, and in defeasance of his Estate; and
therefore ought not to be shewed by him, which shall

have benefit thereby: the contrary is of a condition precedent.

4. For that it is pleaded by way of Bar, and being certain to a common intent, it sufficeth, and it shall be intended that he entred immediately after the Remainder happened; but by *Hales* Justice this common intent ought to be of a vehement presumption, and not indifferent.

5. That this words, *if* W. *dye*, *then he shall remain*, is a limitation of time when this shall vest, and not a condition. By *Hinde*, and *Montague*.

6. Admitting that it be a condition, yet a remainder may depend upon a condition. By *Hale*, *Hinde*, and *Montague*, and adjudged accordingly.

7. The Plantiff hath not conveyed to himself Title, to have benefit of the breach of the condition, if it be broken. By *Montague*.

Pollard, Serjeant for the Plantiff. The Form of the Plea is not sufficient for two causes. 1. Because he doth not aver his continual residence after the Remainder happened, but after his entry, which may happen to be long time after, and so if one is bound to enfeoff S. of the Mannor of *D.* if he make a deed to another of 20. Acres part of the same, and after enfeoff S. of the Mannor, although that he hath performed the words of the condition, which hath not satisfied the intent thereof, yet he hath not performed the condition, because the intent was, That he should have all the Mannor. So 14. *H.* 6. 10. A man is bound that his Feoffees of the Mannor of *D.* should grant a Rent of 40. s. to the Plantiff. He had three Feoffees, and two of them grant the said Rent to him, and there all the Jurors said, That it shall be intended all the Feoffees

nd not two alone; so that alwaies the intent of the ondition ought to be as well performed, as the ords of the condition; and here the intent of the ondition appears to be, That Hospitality shall be ept upon the Grange continually, from the begin- ing to the end of the Term, which is from the eath of the Husband and the Wife, till the death f the Defendant; and here he hath not shewed that e entred within as short time as he conveniently ould after the death of the Husband and Wife; nd therefore because he hath not shewed and aver- ed this, he hath not shewed the performance of the ondition, and therefore his plea is not good: For n all cases where the time is issuable, he ought al- o to shew it certainly: and therefore in 32. *H.* 6. it s held, That if a man plead a Lease for years made o him, that he ought to shew what day the Lease was made, because it is issuable. So in 33. *H.* 6. 44. *In* debt by an Executor the Defendant saith, That the Testator made the Plaintiff, and one *R.* his Executors at L. the which *R.* is alive and not named, judgment of the Writ, and the Plaintiff confessing it, saith, That after this time last assigned by the Plaintiff, that the Testator made the Plain- iff his sole Executor in *Middlesex*, and the Defen- dant saith; That after this time last assigned by he Plantiff, that the Testator made the Plaintiff and *R.* his Executors after this time, and the Plea of the Defendant was not held good, for that he day on which the Plantiff, and *R.* were made Executors, is uncertain. So 3 *H.* 6. 33. In Tres- pass the Defendant pleads in Bar the day of the re- aining of the Plaintiff, who traverseth the Bar, and he Defendant enforced to shew the day certain. *Matter in Law.* As to the matter in Law, it seemeth to me that the

Remainder is void, because it ought alwaies to b
limited to take its effect after the particular estat
ended, and not during the particular estate; for
it be limited, and appointed to take its effect, du
ring the particular estate, then it shall be utter
void. As if *A.* Leases to *B.* for life, the Remainde
for life; and if *B.* dies, that it shall remain over t
a stranger in Fee, this Remainder is void, for th
it is appointed to take effect immediately after th
first estate for life ended, for if the Remainder i
Fee should commence, then it shall avoid the Re
mainder for life; so if a Lease be made to two
the Remainder over in Fee after the death of th
first of them, this Remainder is void, because th
Survivor shall have the Land. So in the principa
case it is given to the Baron and Fem for their
lives, the Remainder to the eldest son for life upon
condition, That if the eldest die, living Hus
band and Wife, that then it shall remain to the De
fendant for life, which cannot be; for the first estate
at this time continues, and if the Remainder shall
be good, it drowns the estate of Husband and Wife,
and therefore the Remainder void, and also for
25. that it is limited to commence upon condition,
which enures alwaies in privity; therefore if a lease
for life be made, rendring rent, and upon condi
on, That if the Rent be arear, that then it shall re
main to a stranger in Fee; if the Rent be arear, and
not paid, the remainder is void; for the Remain
der which commenceth upon condition, is not good;
otherwise it is, if an estate be made for life upon
condition, That if the Tenant for Life dies, it
shall remain over, this Remainder is good, because
that it commenceth upon the Determination of the
Estate, the which is certain; and therefore no con
dition, because conditions are alwaies incertain,

and

and may be performed or broken; and as our Law is, for to know the time certain when the things pass from one to another, and namely Free-hold, because the Law hath it in greater estimation then other things, and so to prevent contention, hath ordained Ceremonies to be used, as in every Feoffment, Livery, and in every Grant, Reversion, or Rents, *&c.* That Attornment shall be made, the which are points certain containing time, and by them Estates pass. The Law hath appointed that every Remainder shall have three things by the matters aforesaid, as Notes and Rules certain for to discern when good. The first is an Estate precedent, made at the same time that the remainder Commences, and that the particular Estate continue when the Remainder vests, and that the remainder be from the Donor at the time of Livery, and if any of the said, three things fail the Remainder is void. And therefore for the first point, if the Lessor confirm the state of his Tenant for years, the Remainder in Fee; this Remainder is void, for that the Estate for years was made before the Remainder. So if a Lessor disseise his Tenant for Life, and after makes a new Lease to him for Life the remainder in Fee; this Remainder is void because it is a Remitter to his Estate. So an Estate precedent was not made at the time of the remainder, and therefore the Remainder is void. So the Heir endows his Mother Remainder in Fee, this remainder is voyd by reason of Relation; and so the Precedent Estates are made before the Remainder appointed. Secondly, That the particular Estate continue when the remainder vests, as 21 *H.* 7. 12. *per Frowick*, Lease for Life upon Condition, That if he doth not such an Act; that his Estate shall cease, and that then the Remainder over is void, because

Rules to know when Remainders are good.

See Frowicks *argument in* Hill: *terme* 21 H. 7. *to* 12. *neer the end.*

because the Estate precedent is determined before the Remainder appointed, and the Remainder must vest during the particular Estate. Thirdly, because the Remainder passes from the Lessor at the time of the delivery, as *Hales*, *Hinde*, and *Montague* say, and as it is proved by the Cases before cited. So *Perkins*, 12. and 19. Remainder to the right Heirs of *I. S.* in Life, passes from the Lessor presently, although it vests not presently; but here the Remainder passeth not presently, because the Condition precedes the Remainder, as 15. *E.* 7. 1. if *A.* Grant to *B.* That when he is promoted to a Benefice, or do such an Act, he shall have an Annuity; there he shall shew his Promotion, if he demands his Annuity, because it is a Condition precedent, and to him which maketh the Grant; but if he Grants an Annuity untill he be promoted there he shall not shew it, because the Promotion is subsequent to the Annuity, and will defeat the Annuity; and therefore it shall be shewed by the
26. other party, which is contrary. So 7. *E.* 3. 10. A Lessee for eight years, rendring 10. s. yearly, and if he holdeth over to him and his heirs, an action of Debt is maintainable during the Term, for the Rent is a Chattle, because the Fee passeth not presently, for that the Condition precedes the Fee. So 6. *R.* 2. a Lease to two for years upon Condition, That if the Lessee aliens within the Term, and die, he shall have Fee: it is holden that the Fee passeth not presently, because the Condition precedes it; which Cases prove, That the Remainder passes not out of the Lessor at the time of the Livery, albeit that the Condition precede the Remainder; and proves also, That the Remainder Commenceth upon Condition; and proves also that the Remainder is appointed to begin after

the Commencement of the particular Eſtate, the which is contrary to the grounds of Law, and therefore, and for the ſaid other cauſes, the Remainder ſhall be void. And ſo for the inſufficiency of the matter of the Bar, and Form alſo, the Plaintiff ſhall recover.

Cook, Serjeant to the contrary. As to the two Exceptions which have been moved, That the Plea is not good, becauſe he ſhews not that he hath been reſiant (after the deaths of the Husband and Wife) alwaies, nor what day he entred Sir, I take it, That it ſhall be taken, that he entred immediately after the death of the husband, and Wife, for the Defendant hath pleaded by way of Bar; and if the Bar hath matter of ſubſtance, and is good to a common intent, it ſufficeth, although it be not good to every ſpecial intent; and therefore in the Caſe of 33. *H.* 6. *fol.* 24. where the Defendant pleads, That the Teſtator made the Plaintiff, and one R. his Executor, Judgment, *&c.* The plea was good, without ſhewing that he was made after that the Plaintiff was made ſole Executor, becauſe it ſhall be intended after. So 10. *H.* 7. 15. by *Keble*; in Treſpas the Defendant pleads his Free-hold, which plea is good; becauſe good to common intendment; yet the Plaintiff might have an Eſtate for years, and it may ſtand with his Bar, and by which he may puniſh the default, but ſuch ſpecial matter will not be intended. So 6. *E.* 4. 1. in Debt upon an Obligation the Defendant ſaith, That he hath done ſuch things as was contained in the Indenture, and at Iſſue, and found for the Plaintiff, and ſpoken to, in Arreſt of Judgment, becauſe the Defendant ſaid not that the two Covenants were all, and ſo had not alleadged the performance of all, but held good, becauſe by Common intent there

ſhall

shall not be intended more then two Covenants, if the Plaintiff shew not the contrary. So 3. *H.* 6. 4. in Formedon he gave not *prima facie*, a good Bar, because it intends a general gift; and yet it may be, That the Land was recovered in value, and then the Plea is not apt, for other Land was given. So 3. *H.* 6. 3. In Debt, nothing in their hands pleaded by Executors, good; yet it may be that other goods first, not the Testators, at the day of his death, are come to their hands in place, instead of other goods. So 21. *H.* 6. 17. In Assise the Defendant was in by discent, where he had a mean Title, which tolled the Assise of the other, and shall not be void by the said recovery; but this shall not be intended without shewing; so discent and entry in Bar, good; yet it may be that a stranger abated, and dyed seised, and the Heir could not enter; but it shall not be intended without shewing specially; but when a thing Commenceth in respect of the time, then the certainty of the time shall be shewed, *fol.* 24. 27. 33. as 20. *H.* 7. 12. by *Rede*. A Servant, which demanded 20. l. Sallary for his service by the year, ought to shew the expiration of the year, because the Action is given in respect of the year past, and the time is parcel of the cause of the Demand, and precedes the Demand; but here the time pursues the Remainder and is not cause of the Remainder; and therefore we ought not to shew it so certainly, as where time gains a thing, for here it goeth in defeasance of the thing; and therefore the Bar is good, notwithstanding the said two Exceptions; besides, it seemeth to me the Remainder is good. For first, he hath an Estate here, upon which the Remainder may be grounded; & here the remainder is appointed thereupon, but the cause wherefore the Remain-

er ſhall not be good, is alleadged in two great oints, *viz.* becauſe the Fee paſſeth not preſently orth of the Leſſor, and alſo for that the Remain- er cannot paſſe upon Condition. And it ſeems to ne, That the Remainder paſſeth out of the Leſ- or preſently, howbeit that it veſts not preſently, s in † *Litl.* 81. A Leaſe for five years, if he pay ithin the firſt two, that then he ſhall have Fee, the ee paſſeth out of the Leſſor preſently; ſo the Re- ainder to the right Heirs of *I. S.* in life; and a emainder may Commence upon Condition, as a eaſe for life upon Condition, That *I. S.* marry y Daughter during the ſtate for Life, which ſhall emain to him, is good, becauſe he hath an Eſtate pon which it may be grounded. So 34. *E.* 3. De- iſe for Life upon Condition, that if the Heir to hom the Reverſion deſcends, diſturbs Tenant or Life, or his Executors of their Adminiſtrati- n, That then the Land ſhall remain to the Daugh- er of the Diviſor, and to her Heirs, and dyeth: enant for Life dyeth, the Son of the Daughter rings his Formedon againſt the Heir, becauſe he iſturbs the Tenant, and alſo the Executors of the enant, the Heir traverſeth it, and upon this, iſſue joyned, which ſhould not have been ſo, if the emainder had not been good. Alſo if Aſſent, as 8. *E.* 4. 12. by *Catesby*, *ante* 8. *poſt* 31. to the Di- eiſen made before to anothers uſe. And if one may ranſferre a free-hold from one to another, by like ſſent, *à fortiori* a condition may; namely where the ranck-Tenement precedes, to which a Condition ay be annexed.

† *See Litrl. in Cap. of Eſtates upon conditi- on.*

Morgan, *Serjeant* for the Plaintiff. The Plea is ot good, becauſe it doth not ſhew the day in ertain, of the death of *W.* nor of the Husband nd Wife, but he argued not this.

Alſo

Also it is not good, because he shewed not the d
of the entry, for a Bar good to a Common intent,
not good; because parcel of the Substance is le
out, and because *Durante termino*, is for all th
Term; for that the time, which is parcel of th
Substance of the Bar, ought to be shewed, as if on
plead a Feoffment in Bar, this shall be good to co
mon intent, and yet, it may be, the Feoffee was un
der age or in Prison, for then speciall things mu
be shewed incertain. So 3 *H.* 7. 3. the Lord wh
Leaseth, within the year entred for Mortmain, fo
otherwise it shall not be intended for to enter with
in the year, if he doth not set it forth; but the B
is good where such things are limited, because th
by special, and not by general intendment they a
omitted; As to the matter, there are principall
two things, upon which Arguments may be made
viz. Maxims, and Reasons, the Mother of
Laws; and the Maxims are the Foundations of th
Law, and Conclusion of Reason, and therefore a
holden as firm Principles, and Authorities of them
selves. One is, a Remainder shall not be limite
except it be to a person capable at the time, as to
Monk profest, which afterwards is deraigned, a
after this, the Tenant for life dies, the Lessee for li
shall not have the remainder, because he was not
person able at the time of the remainder limited,
take it; so a remainder to him, That the particul
Tenants shall name, and after he nameth one,
the Remainder is void for the cause aforesaid. B
32 *H.* 6. if the remainder is limited to the ri
Heirs of *Jo.* S. who is living, and he die before t
particular Tenant, it shall be good, because I.
shall be intended then dead; also because by
presumption, and intendment of Law, *I.* S. m
have an Heir, which the Law will appoint in
spi

ſpight, and ſo by the certainty of the heire, the emainder ſhall be good; but ſhall not be good here it ſtands indifferent, if he to whom the Reainder is limited, will be a perſon able, or not. nother Maxim is, That a Remainder may paſs out the Leſſor at the time of the Livery; for that *ckel* ſaith in *Litl.* 162. the Remainder is void for is cauſe amongſt others: ſo here it paſſeth not by e firſt Livery, becauſe a Condition precedes the ommencement of the Remainder, *viz* if *W.* die, ving the Husband and Wife, then the remainder the Defendant, and ſo paſſeth not at the firſt Liry; and therefore void.

Littlet. in cap. de Garranty. caſe 720.

Brook, Serjeant to the contrary. As to the untainty of the time of the Entry, the Bar ſhall be tended the better for the Defendant, which is, hat he entred immediately, and the Bar ſufficeth, hich is good to a Common intent. And there-re about 20 *E.* 3. it is holden, That if one plead Bar, That one *I. S.* died ſeiſed, and *R. S.* enred as Son and Heir to him, whoſe Eſtate he hath, is ſhall make the Bar good; and yet it may be at he was not Heir, for it is not expreſly d, That he is Son and Heir, but that he Entred Son and Heir; and yet, in as much as it is pleadby way of Bar, the beſt ſhall be intended for the fendant; ſo here. And he argued beſides, much effect as *Cook* did.

Sanders, Serjeant for the Defendant. The Bar good to a Common intent, and the beſt ſhall intended for him which pleads it; for a Plea in is alwayes made for two cauſes: The one to rce the Plantiff to make his replication. The er is to compel him to joyn Iſſue, which cannot joyned upon the replication, as it may upon the , and then the certainty ſhall be in it, and not

of

of necessity in the Bar; and therefore the Bar goes
it it be good to a Common intent. As in Assise
the Tenant pleads in Bar a discent to the Plain
tiff, and to two others, and that he hath the estate
one, it is a good Plea, because it is intended
lawfully; yet he may have it by Disseisen, and the
he is a Disseisor to the Plaintiff also; for he cannot
be a Disseisor to one, except he be so to the other
So 27. ass. 31. in an Assise by the Heir, the Te
nant saith, That the Father of the Plaintiff being
Tenant by the courtesie, and now in life, Leased his
Estate to his Father, which died, and he is in as Son
and Heir, Judgment if Assise, and held a good
Bar; yet he doth not say, That he was the first
which entred, and yet good. So 21. *H.* 6. 1
here *fol.* 26. as to the Remainder it shall be good
because it is a principle, that it shall be taken most
strongly against him which made it; and therefore
in 31. *H.* 8. If a man gives to a man, and to Heirs
without this word [his] it is Fee, yet he giveth no
Fee expresly. So 18. *E.* 3. 28. after 170. A gives
Remainder by word, That after the Decease of
Tenant for Life, the Lands shall return to *A.* and
B. in Fee. So a Remainder to the right Heirs of
S. in Life passeth presently, and shall be in abey
ance rather than void; and that it shall be to the
benefit of the Lessee against his own Livery and
limitation, as alwayes the Law interprets words
strongest against the Speakers, as in 40. *E.* 3. 5.
49. *E.* 3. 1. A Termor counts that he left the
good as he found it, and the Wind blew down the
House, it is not waste, but Covenant lies, for
† special Agreement alters the Law, and makes
his words to be taken more strongly against him
the Law taketh the Acts aforesaid strongly against
the Makers, And therefore if *I.* give to *B.* [illegible]

† *Modus et Conventio vincunt legem*, Bract.

upon Condition, That if he Marry my Daughter, he shall have Fee; if he Marries her he shall have Fee: for by the Livery, it taketh Commencement, and by the performance of the Condition, it taketh perfection, and in the mean time it is ambiguous. So a Lease for years upon Condition, That one moneth after he shall have Fee, he shall have it after the moneth accordingly, for the thing passes according to the Covenant, most strong against the Donor. So a Lease to two upon Condition, That if the one die within seven years, that then after the death of the other, it shall remain to a stranger in Fee, this Remainder is good; and Privies and strangers are all one, because he hath an Estate first given, to which the Condition may be annexed, and Livery, and Limitation shall be taken strongest against him which makes it. Three things one shall have by Remainder. First, he shall have a Remainder to vest; Secondly, a Possession in Law; and Thirdly, a Possession in Deed, and if he be capable at the time of the Possession in Law cast upon him, it sufficeth, as 17 *E.* 3. 29. and 18 *E.* 3. 39. a gift to one and his first begotten Son, and he hath no Son then, but afterwards he hath, is a good Remainder to his Son. So 39. Assise *Pla.* 20. a gift to Husband and Wife, and to one Heir of his body, is a good Remainder, yet no Heir to the gift, if he be in being when the Possession in Law is cast upon him; but a Remainder limited upon contrariety, is not good according; but the other cause that *Litl.* assigns, for that it vests not at the time of the Livery, is no cause, as is proved by the cases aforesaid, because after the Alienation and gift, it may not remain to another. And the other cause that *Litl.* alleadgeth is, because it vests not at the time of Livery, which is no cause, So a gift to *A.* and his Heirs

M. 18. E. 3. *fol.* 59.

17.

ſo long as *B.* ſhall have heirs of his body, Remainder to *C.* in Fee is void for the contrariety, becauſe a Remainder cannot depend upon a Fee determinable. So a Leaſe for life to *A.* upon Condition, That if *B.* pay 20. l. to the Leſſor, that then immediately it ſhall remain to *B* is void for the contrariety becauſe *A.* ought to have it during his life. But if it were to remain after the death of *A.* to *B.* then it were good, becauſe no contrariety there; and here if *W.* dies, living the Husband and the Wife, that then it ſhall remain to the Defendant, this is not intendable immediately in their lives, but that it ſhould remain as it ought to remain, *viz.* after the deaths, and ſo there is no contrariety, and therefore good. As to the Condition which is ſubſequent if he would dwell there, *&c.* becauſe it hath two intendments; the one that he ſhould inhabit there all the Term, and the other to ſome time during his life, ſhall be taken ſtrictly, and the moſt ſtrongly againſt the Leſſor, *viz.* That he inhabit there at ſome times during his life which ſufficeth as the Feeffee upon Condition for to pay 10. l. to the Feoffor, and no time is limited, he hath during his life. So to ſerve him in ſuch an Office, and ſaith not how long he hath, during his life.

Harris, Serjeant to the ſame purpoſe. And as to the Exceptions he ſaid, That a Condition ſubſequent, and which goeth in the Defeaſance of the Eſtate, as here, he that claims the Eſtate ſhall not ſhew it, but the other which will defeat the Eſtate. But where the Condition precedes the ſtate, he ſhall ſhew who ſhall have it, becauſe enabled thereunto as if I grant a Rent Charge upon Condition, That he ſhall do ſuch an Act, there the Grantee ſhall avow for the rent without ſhewing the thing done, becauſe

because it is a condition subsequent, and defeats his Estate. But if I grant, That if he doth such a thing, that then he shall have the rent, he shall not avow without performance shewed, because he is enabled by this to the rent. 14 *H.* 8. *Wheeler* Grants his Term to one upon Condition, That he shall obtain the good will of the Lessor, and then shall have it; he shall not have it until he hath shewed the performance of the Condition, and he affirms the remainder upon Condition to be good.

Hales, Justice. If he would, *&c.* is a Condition, and that the Plea is insufficient, because the Defendant hath not averred his continual residence after the Remainder happened; for during the Term, shall be intended all the Terms as it shall be in reservation of rent or Covenant to repair a house during the Term, and so it is taken, 27 *H* 8. 19. in *Dorkwrays* case by *Audley*; so the Feoffees shal be intended all the Feoffees, and if he hath a reasonable excuse, he ought to shew it, *fol.* 272. *viz.* That he was 200. miles distant at the time of the death of the Survivor of the Husband and Wife, and entred so soon as he had notice, which he shall shew in certain, that the Justice may trie it, as 22 *E.* 4. 27. Tenant for Life Leases for years, and dies; The Lessor bringeth Trespas against the Lessee, who saith, That in as short time as he could after that he had notice of the death of the Tenant for Life, he chased his beasts forth of the land; and said also that the Trespas was between the death of the Tenant for Life, and the chasing out of the beasts, and held no plea; for by the death of Tenant for life, the Lease for years was determined, and no man bound to give him notice; and there it is holden, that he ought 31

to say, That such a day he chased out the beast and might shew that the Lessor died in another County and so he could not have so soon notice; and this shall be tried by the Justice if the avoidance was in reasonable time. So in this case the day of his Entry for the knowledge of the Jurors, ought to be set forth; common intendment is that which hath more vehement presumption and intendment then any other intent hath as 3 *H.6.3.* before 26. Executors to plead, they have fully administred all goods which were the Testator's the day of his death, is good; yet might have goods were not the Testators, which are assets after the Debts paid; but the most common intendment is That he had no other goods, except those which were the Testators, but intendment indifferent that more strong intendment the one way or the other and therefore ought to be pleaded in Bar, as 13 H. 8. 15. by *Willoughby*, the life of *cestui que vie* is pleaded in a Lease for another life which is indifferent, if he be alive or not. So if he pleads a release made after the Obligation, it is not good if he shews it not, by expresse words, that it was delivered after; it shall be intended that it was delivered when it bears Date. But on the other part it shall be intended also, That the other would not bring an Action if it were delivered after, and therefore shall be shewed which intendment stands indifferent; so here, A Demurrer all times after the Remainder happens or not, is certain, and therefore because he hath not shewed this, the Plea is naught. As to the matter in Law, it seemeth to me that the remainder is good for a man may passe the thing in question when and where, and how he will if it be not against Law nor repugnant, as here the limitation, if the re-

maind-

ainder is not against Law; for the remainder
ed not passe forth of the Lessor, *fo.* 29. for upon
e Agreement first had by Act made afterwards,
anck-Tenement, or remainder, may be transfer-
d and devested from one, & vested in another; as
Lease for life, remainder for life upon condition,
hat it shall be void if he doth not such an act, the
mainder before the Condition broken is in him;
hen broken it commeth to the Lessor. So a rent or
eversion passeth by Attornment, not by the Grant
esently. So 1 *H.* 7. 31. by *Brian*, a remainder to the
when the Deed is inrolled, then it shall passe and
late to the Livery. So in the case of *Plessington*
R. 2. where the Condition was, That if the
essor die within the Term, the Lessee shall have
r life, and there holden that his estate shall be en-
rged if the Lessor die. So Disseisen to the use of
passeth not a Free hold to *I.* without his agree-
ent; so here. A remainder passeth when *W.*
ed, not before, by force of the words annexed to
e Livery. So by *Litl.* a confirmation to the Hus-
nd and Wife, Tenants for life, passes the re-
ainder to the Husband, yet it passeth not at the
me of the first Estate, and the diversity where Fee
pon Condition is appointed to Privy, and where-
a stranger is but a conceit which is worth no-
ing, (29. according 24. to the contrary,) and
privity because it reserveth out of both; so it
all bind him in remainder, and also he in rem in-
er shall have waste, and so is privy to the particu-
r Estate, and the Lessor also; and the words then
hich shall remain, shall not be intended presently 32.
to destroy the particular Estate, but shall remain
a remainder ought to divest then, and is to be
xecuted after their deaths; as if Donee in Tail
th such an Act, then to remain to his right heirs,
which

which vests when the Act is done, and after the Tail ended, shall be executed, and not presently upon the Act done to avoid the Tail; so here There is not any repugnancie or prejudice to any but a thing when it is done, made in prejudice of another, shall be void; as a remainder that he shall have the land in the life of the particular Tenant So 21 E. 4. 44. The King dischatges an Abbot That he shall not be a Collector, when any tythe should be granted by the Clergy of *England*; and *Canterbury* grants Tythes, provided that the Collector returned by the Bishop, shall not be discharged by the King, and the Bishop returns the Abbot Collector; there holden that the Grant by the Clergie in this point, *viz* to charge persons exempt is void, because it is in prejudice of others. And so the remainder here shall be void, rather then a stranger shall have prejudice by it; but for defaults in the pleading, the Plaintiff ought to recover.

Hinde, Justice, to the 3d. exception; The death of the particular Tenant shall not be shewed, which is onely conveyance of the execution of the remainder, and is not Traversable, nor Issuable To the first, and Second exceptions, he needs not shew his continual residence after the Remainder is fallen, nor the day of his entry, because it is a Condition subsequent, and goes in defeasc of his Estate; and he which hath benefit by it, ought to shew it; as 29 H. 6. 22. the Grantee of an annuity *pro consilio impendendo*, shall have the Annuity without shewing that he hath given Counsel, for that the shewing of it is not beneficial to him, and the denial of Councel defeats the Annuity; so he agrees to the diversity in case of Annuity. 15 E. 7. 1. by *Pollard* when one shall be promoted, and there-

therefore the shewing hereof that which is surplussage, and the imperfectnesse of it shall not make the Bar vitious; and the Remainder here by him commenceth not upon Condition; but it is a limitation, and explanation from the time that it first begun; for nothing; or words makes a Condition, but such, which restrains the thing given; as if *I.* Lease for life upon Condition, That if the Lessee die, or maketh waste, and *I.* recover the place wasted, or any parcel of it, That *I* shall enter into all; for it is a Condition for that part in which no wast is done, because it restrains and defeats that part. And if it be a Condition here, yet the Remainder thereupon is good, if it commenced and vested at any time during the particular Estates; (24, 29. 32, 34.) for when he hath Fee-Simple, he may Condition with it as he pleaseth, if it be not against Law; as if *I.* Lease for life upon Condition, That *I.* S. paies to me 20. l. that *I.* shall enter, then the Remainder is void, because the entry avoids the first estate, and then no particular estate continues upon which a Remainder may depend. 33.

Brown, Justice, to the same purpose. The entry of the Defendant, shall be intended immediately, for this is the most common intent; and a Bar good to a common intent, shall be intended that he entred presently after his Title accrued, and to the matter in Law, hold that the remainder shall be good upon Condition.

Montague, Chief Justice, to the same intent. The entry of the Defendant shall be intended presently; for this is the most common intent; and a Bar good to a common intent, is good; as 21 *E.* 4. 83. in Assize the Tenant pleads a descent to him as Son and Heir, and he entred, and it was

held good; yet the Father of the Plaintiff might have abated, and died seised, & then the Plaintiff in as Son and Heir, in which case the Tenant might not enter. But this is not intendable; but the most common intent is, That the Tenant entred immediatly after the death of his Father. So 9 E. 4. 12. in Debt against five Executors, at the Dis-ress, 3. make Default, 2. appear and plead Recovery against them two of 300l. and that more they had not in their hands. Exception taken That because by intent there should be five Executors, two might have abated the first suit, and the Recovery not duly had, but holden good: because it may be that then they two only administred, in which case the actions did lie against them two only and the most common intent is, that it might be so rather than at first to lose advantage to have abated the Writ; and therefore the Plea in Bar was held good, and Execution duly had and if it were otherwise, the Plaintiff ought to have shewed it. So 21 E. 4. 81. *In formedon in discender*, The Tenant pleads the release of the Demandant without Warranty in Bar, yet might be made by him in the life time of the father, and then it is no Bar; but it shall be intended to be made after the death of the Father, if the Demandant replies not to the contrary; but if he which pleads in Bar is bound at a time certain, he ought to shew the day of his Act certainly as the day of entry for Mortmain, so that it may appear to be within the year. So if one justifies for Common between *Lammas* and *Candlemas*. So if one justifies by Warrant, by Licence, by Authority, he always ought to shew the time certain of his justification; so that pleading in abatement of the Writ, or a plea after the last continuance, ought

plea

plead certainly; and these are observed as princi- 49.
ples in our Law; but he which pleads in the Ne-
gative ought not to plead certainly. If he would
dwell, &c. It is like that it is not a Condition here,
because it is not compulsive, so that he shall have
prejudice if he doth not, but is a thing obligable
to the will of the Defendant, and then his entry is
not material, but is at pleasure; and therefore the
not shewing thereof shall not make the Plea vici-
ous. Admitting that it be a Condition, yet it is
subsequent, and in Defeasance of his Estate. (30.)
and therefore shall not be shewed by him, but by
him which shall have benefit by the breaking of it.
So if a Condition be enlarged the Defendant must
shew it, who intends to have the benefit of the
enlargement. Also it hath no Livery for to
convey Title, nor hath it enabled him any waies
to take the benefit of the breach of the Condition
if it were broken, because he hath Demurred ge-
nerally upon the Bar, in which the Defendant hath
not acknowledged any reversion. And so it ap-
peareth not by the Record that he is other then a
meer stranger. And by the Common Law no
man shall take benefit of a Condition, but such a
one as is privy. And therefore 38 *H.* 8. 34. *Pat-
entees* of the King may take advantage of Conditi-
on. As if it be a Condition during the Term, it shall
be intended all the Term; as a man bound to per-
form Covenants, is bound to perform all, and his
Assignees. Yet if he be sometimes absent, and his
family there, it is good; because the Law shall have
a reasonable Construction in things alwaies. If
he dies, then the Remainder is a Limitation, and
appointment of the time when the remainder shall
rest. But admitting that it be a Condition, yet
a Remainder may depend upon a Condition,
which

which every lawfull owner of the land may give
what person or persons, and in what manner, a
at what time he pleaseth, if his gift be not agai
Law, or repugnant; as 10 *E.* 3. 39. A m
makes to his Termor in surety of his Term,
Charter of Feoffment upon Condition, That
he be disturbed of any part of his Term, that the
he shall have Fee; he was disturbed, and afte
wards outed, and recovers in Assise, which prov
that the Franck-tenant passed upon condition ex
press to the Livery; & be it mediate, or immediate
it staies not the Remainder, because his Live
shall be taken most strongly against him. So
H. 8. 24. Remainder to a stranger if the gift fail
for bearing of the standard. So in *Plessintons* ca
it is held, That the estate of Free-hold there cou
not Commence upon Condition, but the cau
wherefore, was, because he had not the Free-ho
upon performance of the Condition, which w
repugnancie. So a Remainder upon condition, co
trary to the Law, or impossible, is not good; b
cause a Condition unlawfull, or impossible, i
not obtain the thing by doing of it. So if the D
nee aliens, then it shall remain, is not good, b
cause repugnant, for when he hath aliened to o
it may not remain to an other. Remainder ou
to have estate precedent; for that 9 *H.* 6.
Lease to a Monk, Remainder over void, beca
a Monk hath not capacity, and so the estate wh
precedes the Remainder, void. Remainder a
35. ought to be of a thing in *esse* before; and therefo
a Grant of a rent out of land, remainder in Fe
void; because the rent was not in *esse* before;
the remainder here passeth presently by the L
ry upon possibility to be afterwards performed,
vests when *W.* dies, and in the mean time re
abeya

beyance; as 15 *H.* 7. 10. Fee Tail passeth upon possibility, That a Fem Coverr, and a married man may inter-marry, and in the mean time the inheritance, *viz.* The Tail shall be in abeyance, but holden there, That they are seised in Tail presently, and concludes that the Remainder is good, and the pleading also; and so the Plaintiff shall be barred.

Plat *against the Sheriffs of* London.

ONe *Goodlad* was in Execution *Ludgate* upon a recovery in Debt had against him by plaint in the *Guild-Hall* of *London*; and going with a Baston, (that is to say, a Servant of the Gaolers) attending upon him into *Southwark*, in the County of *Surrey*: and the Administrator of him which recovered, brings his Bill of Debt into the Exchequer against the Sheriffs for the escape, and adjudged that he should recover thereupon. But no exceptions were taken to the Bill, and the reasons of the Judgment were, 4. E. 6. In the Exchq.

1. For that the Action lyeth at the Common-Law by 45 *E.* 3 9. Debt against one *Abbot*, or *Prior*, and also for that, That he had not remedy against him which escaped; for by the escape he is discharged for ever against the party, and the Goaler also; and the Officer which suffers the escape, is charged contrary to 13 *H.* 7. 1. But the Action lay not by the Common Law, by 42. Ass. 11.

2. Admitting that it lay not by the Common Law, yet it lyeth by equity of the Statute of 1 *R.* 2. c. 12. which gives an Action against the Warden of the Fleet, or by the equity of the Statute of *Westmin.*

Westmin. 2. c. 11. which gives an Action against the Gaoler which suffers an Accomptant for to escape.

3. The Defendants have admitted the action good by their Demurrer.

4. That it is an escape, because he was out of the Jurisdiction and Authority of the Sheriffs, and that his Imprisonment is ended the last instant that he was in *London*, and his escape began the first instant that he came into *Southwark*; and so he was never in prison in *Southwark*, for he had no guard there.

36. The effect of every suit contains and implies in it self 3. things. First, to shew the verity of the matter to the Judge thereof, which is the duty of the party. Secondly, to have judgment to recover and execution thereupon; and this is the duty of the Judge. Thirdly, the making of execution for to take the Defendants body, and detain it in prison; and this is the duty of the Officer: and because he only hath offended, it is reason that he be punished (that is,) That he answer the loss to the Plaintiff; for that he hath not any remedy against him which escapes (nor the Goaler never apprehended him, because a personal thing once suspended, is extinguished,) and therefore if the Debtee maketh the Debtor, and another which surviveth the Debtor, his Executors, yet the Debt is extinct and the person of either of them discharged. Therefore in respect that after the escape, the Plaintiff shall not have other execution, and so without any remedie against the Defendant, in the first suit the Common Law which is Common Reason, provides, That the Plaintiff shall have an Action of Debt against the Goaler, in whose default the Execution of the Plaintiff, or otherwise the Com-

aw will be defective in this point. And therefore
y 45 *E.* 3. 9. Abridged by *Fitz. b. in Title Debt.*
30. which was before the Statute *R.* 2. where a *Pri-*
dative and removeable, lets one in Execution in
is Guard for dammages recovered in his Court
f Py-powder, escape; *P. D.* bringeth an Action
f Debt against him, and the *Abbot* his Soveraign;
he Writ shall abate, because he is named *Prior*,
hereas he is but one of the *Monks*, where he may
ot be Debitor. But it had been good, if the *Prior*
d been omitted; and Debt is maintainable with-
t contract between them, or privity, in possibili-
upon the escape. As 1 *H.* 7. 8. against the
lark of the Hamper, upon a *Liberate* delivered to
m when the Conusor hath assets. Admitting
at it lies not by the Common Law, yet it lies by
uity of the Statute of *Westminster*, the 2. *ch.* 11.
ich giveth in Action against the Gaoler which
ffers an Accomptant to escape: and by the equity
the Statute of 1 *R.* 12. which gives an Action
ainst the Warden of the Fleet upon an escape,
it shall extend to all other Goalers by equity;
although it be penal against the Warden, yet
is beneficial to many others; As 13 *E.* 1. *Cir-*
mspectè agatis extends to all other Bishops as well
Norwich. So the Statute of 9 *E* 3. 5. That
Executor which first cometh by distresse, shall
swer. 3 *H.* 6. 14. extends to an Administra-
, and 9 *H.* 6. 19. Debt upon an escape of one
Execution, was maintainable against the Major
he *Staple*, who in excuse of himself, saith, That
was imprisoned by force of a plaint, and not in
ecution; the words of *R.* 2. prohibites the War-
of the *Fleet* onely to suffer any in Execution to
out of Prison by Baston, Mainprise, or Bail, and
quity all other Goalers; yet these in *London*
use

uſe it, and it is not an eſcape in them, becauſe they may preſcribe againſt the equity and words of Statutes, which is contrary to their Cuſtoms and Preſcriptions; for that their Cuſtoms as Preſcriptions, are confirmed by Statute, and contrary to the *Statute* of *Silva cædua*, and keeping of *Leets* at other times then the *Statute* appoints, and ſo them in execution to go by Baſton within their liberty. But others ſhall be bound by equity of the ſaid *Statute*; and beauſe this *Statute* extends to others by equity in this point of eſcape, it ſhall extend alſo to an Action to charge other Officers to matters of eſcape. A priſoner marryes the Ward of the *Fleet*, this is an eſcape, and he is at liberty for he cannot be under his Wifes Cuſtody. So the Office deſcends to an Heir which is a priſoner there he ſhall be adjudged at Liberty, although he lieth in fetters, becauſe he cannot be his own keeper in priſon.

Baitons caſe, 44. and *Ridgwaies* caſe, 3. by which it appeareth that the cauſe here is to be underſtood of voluntary eſcapes in the Gaoler; if the priſoner eſcape to his own wrong, the Plaintiff ſhall have a new *Capias ad ſatisfaciendum*, if the Writ of *Capias*, (upon which he is not impriſoned) be not returned; or ſhall be in Execution to the Plaintiff again if he be re-taken by the Sheriff, before an Action brought againſt him upon the eſcape.

Wimbiſh *againſt* Talbois.

4 E. 6. *In the Common Pleas.*

THe Husband makes a Feoffment in Fee to the uſe of himſelf, and his Wife, in ſpecial Tail, the Remainder to the Husband in ge-

ll, the Remainder to him in Fee, 27 *H.* 8. Uſes was made; the Husband and Wife entred, e Husband dies, the Wife ſuffers a recovery by onfeſſion the firſt day, which is not executed; d the Iſſue in Tail enters for the forfeiture by e *Statute* of 11 *H.* 7. *c.* 10. and the opinion of the ourt.

1. That the entry is lawfull, and this forfeiture within the words of the Statute, although that e Wife had not any eſtate in the Land in uſe, yet e had the uſe in the Land, which is all one; and is is an Hereditament which will make *Poſſeſſio fratris*, by 5. *E.* 4. and was appointed by the Act the Husband, and was an inheritance and purſe in him, and ſo within the words of the firſt anch of the *Stat.* of 11 *H.* 7.

2. Admitting that it ſhould be out of the words the firſt branch, becauſe it ſpeaks of gifts to the usband and Wife by any ſeiſed to his uſe; and offees are Donees by the *Stat.* of 27 *H.* 8. of Uſes, 6 *E.* 6. *Formedon* 40.

3. Admitting that it be forth of the words of the t branch, yet it is within the equity, becauſe it is eneficial law, and in advancement of juſtice, and preſſion of fraud.

4. That a remedy by Covin upon a falſe, or e cauſe, is within the *Statute*, although no exeion be ſued; for the Covin is a Condition in w annexed to an eſtate, which condition is oken, although that Execution is not ſued; the *tute* is general of Recoveries by Covin, and indes all recoveries, and this Condition annexed he uſe, ſhall transfer to the poſſeſſion by the . of 27 *H.* 8.

5. That he which entred by ſuch forfeiture, ll be ſeiſed in Tail or Fee, as ſhe ſhould be, if the

uſe it, and it is not an eſcape in them, becauſe t
may preſcribe againſt the equity and words of S
tutes, which is contrary to their Cuſtoms and P
ſcriptions; for that their Cuſtoms as Preſcri
ons, are confirmed by Statute, and contrary to
Statute of *Silva cædua*, and keeping of *Leets* a
ther times then the *Statute* appoints, and ſo
them in execution to go by Baſton within their
berty. But others ſhall be bound by equity of
ſaid *Statute*; and beauſe this *Statute* extends to
thers by equity in this point of eſcape, it ſhall
tend alſo to an Action to charge other Officer
to matters of eſcape. A priſoner marryes the War
of the *Fleet*, this is an eſcape, and he is at libe
for he cannot be under his Wifes Cuſtody. S
the Office diſcends to an Heir which is a priſon
there he ſhall be adjudged at Liberty, although
lieth in fetters, becauſe he cannot be his own ke
in priſon.

Baitons caſe, 44. and *Ridgwaies* caſe, 3.
by which it appeareth that the cauſe here is to
underſtood of voluntary eſcapes in the Gaoler;
if the priſoner eſcape to his own wrong, the Pl
tiff ſhall have a new *Capias ad ſatisfaciendum*, if
Writ of *Capias*, (upon which he is not impriſon
be not returned; or ſhall be in Execution to
Plaintiff again if he be re-taken by the Sheriff,
fore an Action brought againſt him upon th
ſcape.

Wimbiſh *againſt* Talbois.

4 E. 6. *In the Common Pleas.*

THe Husband makes a Feoffment in Fee
the uſe of himſelf, and his Wife, in ſ
Tail, the Remainder to the Husband in g

ll, the Remainder to him in Fee, 27 *H.* 8. ſes was made; the Husband and Wife entred, e Husband dies, the Wife ſuffers a recovery by onfeſſion the firſt day, which is not executed; d the Iſſue in Tail enters for the forfeiture by e *Statute* of 11 *H.* 7. *c.* 10. and the opinion of the ourt.

1. That the entry is lawfull, and this forfeiture within the words of the Statute, although that e Wife had not any eſtate in the Land in uſe, yet e had the uſe in the Land, which is all one; and is is an Hereditament which will make *Poſſeſſio fratris*, by 5. *E.* 4. and was appointed by the Act the Husband, and was an inheritance and purſe in him, and ſo within the words of the firſt anch of the *Stat.* of 11 *H.* 7.

2. Admitting that it ſhould be out of the words the firſt branch, becauſe it ſpeaks of gifts to the sband and Wife by any ſeiſed to his uſe; and offees are Donees by the *Stat.* of 27 *H.* 8. of Uſes, 6 *E.* 6. *Formedon* 40.

3. Admitting that it be forth of the words of the t branch, yet it is within the equity, becauſe it is eneficial law, and in advancement of juſtice, and preſſion of fraud.

4. That a remedy by Covin upon a falſe, or e cauſe, is within the *Statute*, although no exeion be ſued; for the Covin is a Condition in w annexed to an eſtate, which condition is ken, although that Execution is not ſued; the *tute* is general of Recoveries by Covin, and indes all recoveries, and this Condition annexed he uſe, ſhall transfer to the poſſeſſion by the t. of 27 *H.* 8.

5. That he which entred by ſuch forfeiture, ll be ſeiſed in Tail or Fee, as ſhe ſhould be, if the

the Wife were dead, and this in course of disc
and not purchase; (*paramount*, contrary to *Ha*
and that a Son born, may enter upon the Daugh
which hath entred for such forfeiture; contrary
purchase; and that the entry for the forfeiture
maintainable presently in the life of the Wi
which maketh it; and he which enters may a
generally in pleading, That he is that person wh
ought to take benefit of the forfeiture; by all
Justices contrary to *Montague*.

Cook, Serjeant to the Defendant, which sai
That the Replication is not good, because it sh
not how he is Heir in special (but hath aver
That he is the same person to which, *&c*) fo
is issuable, and when such *Statutes* gives entry ge
rally to one, yet if he will take advantage of it,
shall shew how he is the same person, and shall
say generally that he is the same person: as u
6 *R.* 2 *cap.* 6. he which will enter by assen
the Ravisher, 5 *E.* 4. 6. ought to shew h
he is next Heir, yet the *Statute* is general.
for him that prayes to be received upon def
of Tenant for life, by *W.* 2. *cap.* 3. ought
shew how he came to the Reversion. So he wh
will Intitle himself upon 7 *E.* 1. for entry u
Mortmain, how he is Lord. As to the Obligat
That because the Defendant in Bar in saying wh
heir he is, hath affirmed the Plaintiff to be heir,
therefore in the Replication hath conveyed him
to his entry as Heir special, and so the Replica
ill, for default of certainty. Secondly, for
the Plaintiff hath not shewed that execution
had of the said recovery against the Defend
Thirdly, Exception because he hath not
red the Covin specially: for otherwise it is no
endable in Recoveries, because they are al
in

tended true, and upon good cauſe; and there-
ore the Wife at the Common Law, by default a-
ainſt her, and her husband, had not any other re-
edy then a Writ of Right before the *Statute* of
W. 2. *cap.* 3. which gives a *Cui in vita*: and before
W. 2. *cap* 3. a faint Recovery againſt Tenant for
ife, bound him in Remainder. *Litl.* Releaſe, 115.
ecauſe the Law preſumes the Title and caſe true.
So a Recovery upon a faint Title by a man of Reli-
ion was out of the penalty of the *Statute* of *Reli-
ioſis*, untill *W.* 2. *cap.* 23. made a Recovery with-
ut Title in ſuch plight as a Feoffment in *Mortmain*
as, for the truth ſuppoſed by the Law to be there-
n. So here the Recovery is intended to be true;
nd therefore the Plaintiff ought to ſhew matter (if
here be any) to prove the contrary. As in 11. *H.*
. 19. If the Tenant in a *precipe* vouch one of the
Demandants, he ought to ſh w cauſe; becauſe o-
herwiſe the Law will preſume that he hath not
auſe againſt right; *à multo fortiori* here he ought
o ſhew cauſe, becauſe in this point the Law has a
ore ſtrong preſumption. So 15. *E.* 4. 4. Contrary
atry by Title, general averment of Covin by the
laintiff in Dower, was not held good. Without
auſe ſhewn as to the matter in Law, it ſeemeth here
at the caſe is clear out of the words and penalty
the *Statute* of 11. *H.* 7. *cap* 20. For although 27.
. 8. hath executed the Poſſeſſion to the uſe, yet
is caſe remains here, ſo as if 27. *H.* 8. had never
en made, and the Wife had continued Tenant in
ail in uſe, and out of the words of the firſt branch
ecauſe he hath an Eſtate Tail in the uſe in the
nd, but hath not an Eſtate in the land in the uſe;
nd the *Statute* ſpeaks of an Eſtate in the Land;
nd this Hereditament or uſe, which is the matter
nd ſubſtance, and the uſe it ſelf, which is the con-

44. Matter in Law.

fidence of the thing, differ. But one may not have the ſtate in Land and uſe alſo, becauſe ſuſpended; yet two may, to the uſe of one of them; as Husband and Wife to the uſe of the Wife; and ſo it ſhall be intended here. Alſo the firſt branch ſpeaks of lands *&c.* of Inheritance or purchaſe of the Husband, but here the uſe is a new thing, which commences now, and was not in being before; and ſo is not the inheritance or purchaſe of the Husband, and therefore out of the *Statute*; as a Rent granted to one out of lands to the uſe of the Wife of the Grantor, or if the Husband gives a ſigniory in Tail to the Wife for her Joyncture, and the Tenancie Eſcheat, and the Wife ſuffer a faint Recovery, this is out of the *Statute*. So the Husband makes a Feoffment upon Condition to re-enfeoffee him, and his Wife in Tail; the Feoffee doth accordingly, the Husband dyes, the Wife ſuffers a faint Recovery; this is out of the *Statute*, becauſe of the Feoffment the Land was removed from the Poſſeſſion of the Husband, and was her purchaſe, and not the purchaſe of the Husband, or his Inheritance; for the Condition which is the cauſe of the gift, is a new thing, and not within the ſecond branch; becauſe the Wife had nothing here of the gift of any of the Anceſtors of the Husband. Nor the third branch, becauſe the Wife had not poſſeſſion by the *Statute*, nor by the Feoffees to the uſe of him in Reverſion, but he in Reverſion hath the preſent Title; and ſo the *Statute* ſhall be intended; and therefore he may enter preſently: If Tenant for life ſuffer a faint Recovery; but 11 *H.* 7. though it ſaith Enjoy according to their Title, yet it intends that he ſhall not Enter untill after the death of the Anceſtor, becauſe he hath no Title in the life of his Anceſtor. And therefore when the Wife

sents to the Raviſher, 6. *R.* 2. gives title of entry; ſaying, *habeat titulum intrandi*, &c. intends that he ſhall not have it in the life of the Anceſtor. And if the makers of the *Statute* of 11 *H.* 7. had intended that the iſſue in Tail ſhould have entred preſently, they would have given to him Title by ſuch like words as the *Statute* of 6. *R.* 2. hath; but the end of the clauſe which ſaith, That they ſhall enjoy according to their Title, expreſſes that they intended not ſo. For which cauſes it is probable that the Defendant is out of the penalty of the *Statute*; and that the Plaintiff might not enter, and ſo ſhall be Barred.

Whiddon, Serjeant for the Plaintiff. Becauſe the Defendant hath ſaid whoſe Heir he is, he ſhall be taken that he is Heir ſpecial; for a Plea which hath two intendments, ſhall be taken moſt 46.
ſtrongly againſt him which pleads it; as 3. *H.* 7. 2. in Treſpaſs, Releaſe generally is no Plea, becauſe it may be taken to be delivered before the Treſpaſs, or after. So 3 *H.* 7. 8. and 9. and 26 *H.* 8. Entry to avoid *Warranty Collateral*, pleaded in Bar, is no Plea; becauſe it may be intended after the diſcent: for he may enter in the life of the Anceſtor, or after. Alſo the Plaintiff need not ſhew how he is Heir, becauſe he was once ſeiſed by entry. But if he had brought a Formedon upon the Eſtate Tail, he ſhould: becauſe it is by way of Demand; as 6 *E.* 4. 1. Executor brought Treſpaſs for a thing taken out of his Poſſeſſion, he ſhall not ſhew his Teſtament: but if he Demands a thing whereof he had not ever poſſeſſion, he ſhall. It is not needfull to ſhew Covin certainly, which is a ſecret thing: and the Law doth not enforce one to ſhew a thing, when by intendment of Law it lieth not in his Conuſance: as 20 *H.* 7. 7.

A woman shall have Dower of a Rent Charge without shewing the Deed of the Grant; because it belongeth not to her. So the Lord shall have Covin generally for the Ward, where his Tenant aliens, and re-taketh for life, the Remainder to his Heir, being it lieth secretly in the breast, as suspicion lieth; for that he may justifie imprisonment for suspicion of Felony, without shewing of the cause of his suspition. So 33. *H.* 6. 5. In Trespass, a man buys in a Market Overt; the Plaintiff said, That the said buying was by fraud between the Defendant and a stranger generally, without shewing any thing speciall of the Covin; and the Plea there admitted good. So in a *Precipe quod reddat* against the Lord of ancient Demesn, and Tenant, the Lord shall shew that he is Lord; and this Action is brought against him by Covin generally. But 9. *H.* 6. *fol.* 5. He which alleadges Covin, ought to shew cause of the Covin; and the cause is, for that the Recovery, or Title was tryed by Verdict; because to say that it was by Covin, shall not be intended true against a Verdict. But Covin generally may be averred, against a Recovery which was gained by default; because this is cause of the Judgement, and no Triall. Wherefore in this case a man shall averr that this was by Covin generally. And as to that which hath been said, That execution ought to be shewed of the Recovery; that needs not: For the *Statute* speaketh onely of the Recovery, and without Execution, it shall be a Recovery, as a Fine is without Attornment; for the *habere facias seisinam*, recites *cum A. recuperavit seisinam suam*, &c. because the Husband raised the use. First it is his purchase, and so within the words of the *Statute*; and if not, yet it shall be within the equity; and nevertheless it is penal.

33. *H.* 6. *fol.* 5.

Sander-

Sanders, for the Defendant. The *Statute* here is penal; becauſe it goeth in avoidance of Eſtates, and abridges power; and therefore not equitable. And for this the *Statute* of *W.* 2. *cap.* 14. before *fol.* 17. *expectet emptor* for Warranty; becauſe he vouches an Infant; and yet it is adjudged 18. *E.* 4. 16. If he maketh a Feoffment over, this Feoffee ſhall vouch; becauſe penall againſt one, ſhall not extend to another. So by 32. *H.* 8. *cap.* 33. The dying ſeiſed of a diſſeiſor without peaceable poſſeſſion before; for five years ſhall not take away the Entry of the diſſeiſee; yet if one Abator die ſeiſed within five years, this diſcent ſhall take away the Entry. And ſo if Tenant for life be diſſeiſed, and the diſſeiſor die within five years, and the Tenant for Life dieth, he in Reverſion or Remainder may not Enter; becauſe he was no Diſſeiſor to them; and alſo had no Title to Enter, but only the Tenant for Life, becauſe it abridgeth the Liberty given by the Common-Law. Now by this word, [*Inheritance*] is underſtood Land by diſcent, as it is proved by a caſe in 7. *H.* 4. 5. wherein a *Cui in vita* was abated, becauſe the Writ was *quam clamat eſſe jus & Hæreditatem ſuam*; whereas it was his own purchaſe. And by 1. *H.* 5. *cap.* 3. which ſpeaketh of Lands by purchaſe, or by diſcent, and the disjunctive prove the difference between the words. Purchaſe intends Land by gift or purchaſe, which is by Title. Diſſeiſen is not purchaſe, becauſe without Title. Now becauſe the Plaintiff hath in the Replication ſaid, That the Grandfather of the Defendant was ſeiſed in Fee; for to prove the Defendant to be within the firſt Branch; the Plaintiff ought to ſhew here how the Husband of the Defendant came to the Poſſeſſion; for the manner of coming to the Land is Iſſuable, becauſe it may be

M. 7. *H.* 4. *fo.* 5. *in cui in vita.*

1. *H.* 5. *cap.* 3.

49.

by Discent, Purchase, or Disseisin. And a Join[t]ure made by a Disseisor to his Wife, is out of th[e] *Statute*; Recovery without Execution is not a dis[con]tinuance.

Harris, Serieant, argues to the same intent; An[d] he taketh also, that Covin cannot be where th[e] Title is good, except that wrong be done by hi[m] which hath the Title; and this ought to be shew[n] ed; for here in respect that the Title is confess[ed] to be good in this, (That it is not traversed, n[or] confessed and avoided) this Recovery may not b[e] averred to be by Covin; for such averment is re[pu]pugnant in it self, and it cannot stand together t[o] say, that she did right by Covin. And as to th[e] *Statute* he taketh the case here to be out of th[e] words of the *Statute*. And note thou, that he ar[gu]gued to all the other points moved, to the same pu[r]pose that they were argued before.

Molineux, Justice. It is a vain thing to av[er] this specially, which is apparent, as the Covin; an[d] therefore when the Tenant infeoffes his So[n] within age by Collusion, the Lord shall seise hi[m] for a Ward, without shewing this Collusion speci[a]ly. So if the Husband will confess an Action, th[e] Wife shall have Dower by the Common Law [a]proved by recital *w.* 2. *cap.* 4. For it is intendab[le] by the Law to be Covin apparant; but it w[as] doubted if the Recovery had been by Default; b[ut] here the Action had been tryed by the Verdict [of] 12 men, the cause of the Covin ought to ha[ve] been shewed, because the Law giveth credence to [it] As 5 *H.* 7. 20. Upon an *Attaint* no *Supersedeas* shall be granted, because the Law presumes th[e] Verdict to be true, untill the Reversal be try[ed] upon Error, in Deed or Record; so that the La[w] hath an indifferent judgment of it, *viz.* to [be] tr[ied]

P. 5. H. 7. *fol.* 20.

true or false. And so the Covin averred in the avoidance of the trial by Verdict shall be shewed certainly for the credence given to the Verdict. Also Covin upon a good Title is prohibited, because the *Statute* of 11 *H.* 7. is generall. And so Covin generally averred here, without falsifying of the Title, is good; as 4 *H.* 7. *cap.* 20. saith, That a Recovery be pleaded in Bar of a popular Action, the Plaintiff may aver, it was by Covin generally by the Warrant of the *Statute*. As to the second exception, the *Stat.* expounds it self to be intended of a Recovery without execution. Every Feoffe is an inheritance, and then she had an use in the inheritance of her Husband; and held that the Wife held the inheritance of her Husband, (that is to say) his Land in use joyntly with her Husband, and so within the words of the *Statute*; and if not, it shall be within the equity and intent of the *Statute*; and he took without question, that the Heir in Tail might enter presently, and out the Wife which is Defendant, and so held the Plaintiff should recover.

Hales, Justice, to the same intent. And first to the Covin; the Replication is good without shewing cause of it. And the *Statute* is for frail, inconstant woman, and will not make them Judges, if the Title of Action be good or not, 18 *R.* 2. *cap.* 7. gives receipt to him in Reversion; where the Tenant for Life is impleaded by Covin of the defendants, that the Tenements shall be recovered, because it speaks generally of Covin. 2 *H.* 6. 4. and 11 *H.* 4. 3. For this cause there it sufficeth to say, That Tenant for life pleaded faintly, and pray to be received without shewing cause; otherwise it is of Covin at the Common Law; and 4 *H.* 7. would have limited the pain to fained recoveries

veries expresly, if it had intended so much. And the *Statute* prohibits the Covin onely, be the Title good or faint; for in faint Recoverie by Covin, the Issue in Tail may falsifie before Warranty made 40 years after the Disseisen; yet it commenceth the Disseisen, by the intent. As if the Father Disseise the Son, to the intent to make a Feoffment with Warranty to Bar his Wife, Recovers against the which outs the Tenant by Covin; yet she had no good title of Dower, is a Disseisereſs; and Covin apparent here, becauſe he never took view, vouche essoin, or other delayes which he might. The *Statute* saith, That the Recovery shall be void, when by it is not intended that it shall be executed, it shall not be intended to be by Disseisen without shewing.

53. The words of 11 *H.* 7. explain the intent, That such Wives who have Lands in use, or use in Land are within the *Statute*. Recovery against Tenant in Tail, was good onely for his life before the *Stat.* and therefore compriſes use here, becauſe the *Stat.* shall not be made in vain; for Tail in use may do as great prejudice, as Tail in poſſeſſion, and so the intent shall aid the obscurity of the words. Conſtruction of words; but if it be not within the words, yet it shall be taken to be within the equity, becauſe it reſtrains Liberty that the Common Law gave to the prejudice of another, as here of Tenant in Tail to bind their iſſues by recovery or Warranty. So *Marlebridge, cap.* 6. speaks of a Leaſe for years for to defraud the Lord of Ward; yet if it were a Leaſe for life, or gift in Taile, it will come within the equity of the *Statute*. So *W.* 2. *cap.* 1. speaks of 3. gifts in Tail; yet 4 *H.* 5. 6. and 19 *H.* 6. 7. compriſe by equity all manner of intails, becauſe it reſtrains liberty of breaking the intention of the

Do

Donor, suffered by the Common Law. So *W.* 2. *cap.* 3. gives receipt to the Reversioner by equity to the Remainder; for the Common Law, which may not suffer him to be received, suffers a wrong, and this *Statute* remedies it, So 13 *R.* 2. *cap.* 17. that gives receipt for faint pleading by equity, shall also by equity give receipt for faint defending. So 54. an Administrator shall have account by equity of the *Statute*, where it is given to Executors onely. † 1, *H.* 5. 3. So † 1. *H.* 5. 3. gives an Action of Forgery of false Deeds, by which the Title and Possession of another are disturbed, this *Statute* using the copulative, gives relefe by the equity thereof, but not so, if the Title onely be disturbed; and therefore the disseisee which hath not but onely a right, shall have an Action in 4 *H.* 6. 26. because where the Law defective suffers a thing which is a wrong to another, and a *Statute* redresseth it, there things in the like mischief shall be taken by equity, in the like purview. So here because it is made in avoidance of Covin, therefore it is beneficial to the Commonwealth.

Brown, Justice, argued to the contrary for 2. causes in the Pleading. The one was for that the cause of the Covin was not shewed; for howbeit that the *Statute* speaks generally of Covin, yet it refers the pleading of this to the Common Law; and therefore because the cause of Covin was not shewed, the replication was nought. The other cause was, for that the Plaintiffs have not shewed how the Wife Plaintiff was Heir, and therefore may not be seised in Tail, as it was pleaded. And as to the execution, he held that it was not necessary to be shewed. And as to the matter in Law, he held the case here within the words of the *Statute*; and if it were not, yet he held them within the equity;

quity; for that the *Statute* was made in avoidance of Covin, which is to be abhorred; and therefore the *Statute* is beneficial to the Common-wealth. But for the said defaults in the replication he held that the Plaintiffs should not recover.

Montague, Chief Justice. Title amends not Covin, for it may be upon a good Title; and therefore the books are, If a Wife recover Dower against *A.* who by Covin enters, and outs the Tenant, as in 15 *E.* 4. 4. yet she is a Disseisoress; and by 8 *H.* 4. 6. where the issue in Tail recovers against *A.* who by Covin Disseise the Discontinue; he shall not be remitted, although his Title good, but is a Disseisor by reason of the Covin. The Title of a man shall not be tryed between strangers, where he which hath the Title not party, nor shew Covin, because it is a thing secretly determined to the prejudice of another; as Joynt-tenancie on part of the Plaintiff; the Defendant which pleads this, shall not shew of whose Feoffment; for that, that he may have knowledge of it by presumption of Law on his own part here, 21. *E.* 4. 78. and 19 *H.* 6. 32. So 19 *H.* 79. which pleads a Deed which belongeth not to him shall not be enforced to shew it: a man may aver Covin generally, where averment is given by Statute, or Common Law; as the *Statute* of 13 *R.* 2. giveth receipt for faint pleader, and may alleadge generally when he prays to be received. So Termor for years by the *Statute* of *Gloucester* shall be received, and aver Covin generally; and faint pleading, and Covin is all one. So 8 *H.* 6. 7. Assize the Tenant makes default; one shall answer for him as Baily, he appears and disallows him, and saith, That he will make default;

55. *Where Covin is available in pleading & where not.*

Baily

ailiffs comes and Demands Conuſance of this de-
ult made by Covin for to take away their Conu-
nce generally, and holden good. So 10 *H.*6.15.
formedon by two coparetners, one Demandant
grees with the Tenant in Challenge which he
ade to a Juror; that the enqueſt might not be
ken, the other Demandant averrs the Challenge
be made by Covin generally, and it was allowed
od. So if one pleads impriſonment in excuſe of
s default, or ſale in a Market overt; the other
verrs, That it is by Covin generally; or if he pleads
Feoffment, the other averrs, That it was by Cham-
erty generally, and ſo may aver Covin given by
e *Statute* or Common Law generally, where the
uſe of it may not be ſpecial: if it may be ſpecial
herwiſe, it is 7 *H.* 4. 15. *in ſcire facias*, the
ife received, pleads a recovery by a ſtranger, up-
a not denial, and execution againſt him; it is
t the acknowledgement of the Tenant, and his
wn Act, and ſo Covenous. Faint recovery a-
inſt Tenant in Tail, which dies before executi-
, the iſſue is remitted, and the Recovery not ex-
utory againſt him, and ſo is defeaſable; yet
e Covin in the Recovery, which is as a Conditi-
n, is cauſe of the forfeiture of the State; as a
offment upon Condition, not to infeoffee *I.* al-
it that he within age infeoffees *I.* and ſo the
ate is defeaſable, yet he hath broken the Condi-
on.

And as to the other exception taken, for that 95.
was not ſhewed certainly how the Plt. was Heir.
ontague held the Replication nought; for Repli-
ions, Titles, Pleas in abatement of Writs, and
opples, ought to comprehend certainty; the rea-
ſon

son hereof is because the Replication forceth party to issue, and therefore shall be certain, cause the Court, nor the Jury may not be inveig or troubled for the incertainty of the Replicat which maketh the issue; the Law ordaining and viding that they should be certain. But a which is certain to a common intent, is good ; man shall plead in Bar an Estate, without shew how, it is not good; as it is holden 2 E. 4. and every Replication ought to shew contrary ter to the Bar, and then ought to take Traverse, confesse, and avoid the Bar. And here the B good, and the Replication contains a misbeh of the Wife of the Defendant, by which the E is voidable, and then the Plaintiff ought to him able for to take benefit of the misbehavi the Defendant: and here if the Heir pleads not ability certainly, the Bar which is plainly confe is not plainly avoided; for it appeareth not how the Plaintiff is cosen to G. T. & pretextu rum premissoy, refers to him which is said be onely as it is expounded 7 H. 6. 5: in a Bill of against the Warden of the Fleet. 4 H. 7. 13. one binds himself, That he will not claim, nor ter in to the said land in bar, that he entred not, claimed; the Plaintiff replies that he claims, ought to say how, viz. That he came to the L and claimed, and entred. So in 5 E. 4. 6. in plication the Plaintiff ought to shew how he is of blood to the Woman ravished, with conse the ravishment. So for Mortmain, how he So for receipt, how he came to the reversion cial conveyance to the things, which the S give by general words, as here. Titles al ought to be certain, because he that makes Ti by this an Actor, and an Actor ought to plead

ly; by *Hales. fol.* 52. *b.* If a Wife which hath ſyncture by her Husband, ſuffers a faint recove- contrary to 11 *H.* 7. if the Daughter enter, the born after ſhall not out her during the life of Wife. By *Montague*, he may enter preſently, ſave) becauſe the *Statute* ſaith, he ſhall enjoy cording to his Title therein; and the Title is , which is devolved to the Son. But the ghter, becauſe *prima de ſanguine* entring, be- the Wife aſſents to the Raviſher, ſhall hold inſt the Son born afterwards, and there it is ſimple. In 5 *E.* 4. 6. So 9 *H.* 7. 25. the ghter ſhall hold the Remainder appointed to right Heirs, againſt a Son born afterwards, be- it is veſted in the Daughter as a purchaſer, uſe it is Fee-ſimple, to which the Son after- s born, hath not right: for the Land was never of his Anceſtors before, *Et poſſeſſio fratris de ſimplici facit ſororem eſſe hæredem*, of Fee-Tail but it diſcends to the youngeſt Son of the half d. So a Baſtard eign abate in Fee-ſimple , and dies without interruption, and his iſſue , he ſhall hold againſt the *Mulier puiſne* 39 *E.* . Of Land entailed it is otherwiſe; ſo it is a difference between Fee-ſimple, and Fee-Tail; cording to the Proverb, *One ſhall beat the Buſh, nother ſhall have the Bird.* As 9 *H.* 7. 24. and A man hath Lands by the Mother, and aliens Condition, and dies without iſſue; the Heir of art of the Father enters for the Condition bro- the Heir on the part of the Mother outs him, 8. 18. by *Portman*; if a Remainder in Tail ce executed, the iſſue in Formadon ſhall declare the Gift immediately, for all paſſes at one time, pon one Livery. But in 20. *Aſſ. Pl. ultima.* ſhewed of a Reverſion, after Seiſen, or making

See after fol. 113.

Lit. fo. 94. a

Title

Title by grant of the Reversion, he which
Title, is alwaies Actor, and ought to plead
ly. So 2 *H.* 6. 14. A *Patentee* sheweth his
ters *Patents*; if he maketh Title by them.
alwaies if they are ambiguous and obscure in
have been expounded according to the intent
makers: as *W.* 2. *cap.* 3. speaks, when a man
per defaltam is expounded, when the Husban
Wife lose by default: because the Law alwaies
that the Wife may enter, if the Husband
lose by default. So *W.* 2. *cap.* 1. *Et si finis*
hujusmodi tenementa imposterum levetur, ipso
nullus. The Words seem to make a Fine
but yet it is not void: but is a discontinu
and void as to bar the right of Tail. So
Statute of *Glouc'ster*, *cap.* 3. saith, Where
Fine is levied, intends by Husband and Wife
they may well levy, the marriages of Woma
their Estates, and advancement, by this are
58. ly favoured in our Law, for 14 *H.* 8. 7.
Wife shall recover her Land given *causa matri*
prælocuti, if the Feoffee will not marry her. So
have all Free-hold after Divorce. So a Wife
have a *Cui ante divortium*, to recover the lan
by the Husband and Wife by default before
Divorce. So 11 *H.* 7. intends to punish Wo
if they will recompence this favor of the Law
wrong to the disinherison of Heirs; here the
hath an Estate in the use, and by his inhere
ment, and the Land; and Use also is the in
tance of the Husband, and therefore within
words of the *Statute*; because an Use is an
ditament, and [5 *E.* 4. 7.] *possessio fratris* doth
such an use for the Sister also, if she hath the
of 40. s. in Use, [15 *H.* 7. 13. 5 *E.* 4. 7.]
Litl. 108, he shall be sworn in Assizes by the

n Law, and *Statute* of Pernors of Profits, and er *Statutes* have admitted an Use, for an Here- ment, and the Land and use also, is the inhe- nce of the Husband, for an inheritance is h an Estate as the Heir may inherit, as he may e; As to the definition of *Britton*, and the dif- nce by him made between inheritance and pur- se, his book containes many errours, but *Little-* hath better, *quod feodum simplex idem est quod reditas legitima vel pura.* As to the Case of *cui in* , in 7 *H.* 4. before *fol.* 47. by those of the Chan- y, and also by the Register Original 232. is the & the other *quam clamat esse jus & hereditatem*, The Feoffees here were seised to the use of the sband, and every of them hath an entire Use; between Husband and Wife are no moieties, l after the execution of the possession to the Use: 27 *H.* 8. The Parliament made the Convey- e of the Land from one to another: and the Fe- es are Donors; for when a Gift is made by Par- ment, every one by it is privy, and assents to it; the thing shall pass from him which hath most t, and most Authority to give it. As in 21 *H.* 7. He to whose Use, and the Feoffee joyn in a ffment, it shall be said the Feoffment of the Fe- e: for they have most Authority for to give this. Tenant for Life, and he in a Reversion joyns in offment, it shall be adjudged the Livery of the ant for Life. So if one seised in Fee, and an- r which hath nothing joyns in a Feoffment, it l be said the Feoffment of him which hath t, and the confirmation of the other. So e it shall be said the Gift by Parliament of the ffees, and the assent and confirmation of all o- s.

For

For if any other shall be adjudged the Donor ; Parliament should do wrong to the Feoffees in ing the thing from them. And an Act of Parl ment will not prejudice any man, as 19 *H.* 6. the *Rector* of *Edington* had an exemption fr *Tythes* by the Kings Grant, he afterwards agree the Act which granted *Tythes* to the King, and was one of the Grantors, yet shall not take ben by this, but shall be discharged. For the Co mon Law saith, *That none shall be damnified by general Act made by the Parliament*; and there *W.* 2. *cap.* 1. Gifts upon Condition shall not away right *Patient* in *London*; but that remains this day with protestation to sue in the nature Formedon in Discender, if it be out of the words, it shall be taken by equity, although it be penal some man; for here it restrains the Liberty of nant in Tail, because it was for to redress false vin, for to advance right and justice and benef to the weal-publick, As *W.* 2. *cap.* 6 gives a *vita* upon a recovery by default, which was a w to the Wife, and therefore gave *Cui ante Divorti* by equity. So *Marlebridge*, *cap.* 6. *De primogen* and of Feoffment; yet if the first Son dies, he infeoffees the second Son, or Levy a Fine, shall be taken by equity; because it redresses vin, which the Law abhors. So 1. *H.* 7. *ca* gives a Formedon in Remainder against Per of Profits, and 14 *H.* 7. 31. and after 178. *facias* for to execute a Remainder against the ker of the Profits, shall be maintainable by eq No judgement was ever given in this case for default, *viz.* because he had not shewed cert how he was Heir, and in special, for that it wa able, and Title given is certain.

Note, that all the Justices hold the case here within the words of the Statute of 11 *H.* 7. And if it were not within the words, that yet it was within the equity of the Statute. And they held also, that the Heir may enter immediately, (that is to say) in the life of Tenant in Tail; but no judgment was given.

Dive *against* Maningham.

ONe was in prison in execution upon a Recognisance of Debt, taken according to the Statute of 23 *H.* 8. *cap.* 6, and the Defendant being a stranger made an Obligation to the Sheriff, indorsed with Condition, That the prisoner should save him from dammage against the King, and the Conusee; and also that he should be alwaies at his Commandement as a true prisoner to appear before the Justices and the King at *Westminster*, or elsewhere, within this Realm. And it was adjudged a void Obligation by the *Statute* of 23. H. 6. c. 18. M. 4. E. 6. *In the Common Pleas in debt.*

1. For that the prisoner was not bailable but excepted by the *Statute* which in this point is not, but an affirmance of the Common Law.

2. For that, That the third branch of the *Statute* which maketh all Obligations void, taken for any the causes aboveſaid against the form there expreſſed, extends as well to the second branch, in which the exception is, as to the first; for the generality aboveſaid, and also by the intent of the *Statute*, to suppress the extortion of Sheriffs in this behalf.

3. Although it shall not be so, yet he taketh the Obligation *colore officii*, as Sheriff of his prisoner; and so within the *Statute*.

4. No day or place of appearance is limited in the Condition; so the form appointed by the Statute is not observed.

5. Other things are mixt in the Condition with the apparance, as that he shall save harmless; and this shall be intended there for all things, and at all times.

6. He had but one surety, and the *Statute* speaks of surety of sufficient persons, in the plural number by *Montague, fol.* 63.

7. The Obligation here is void by course of the Common Law, for that the Condition is against the Law, for the party is not bailable. 2 *H.* 4. 9.

The *Extent* ought to precede the *Liberate*; here are both in one Writ, yet in nature they are several but the Writ remains good for the extent, and the other is surplusage. 7 *H.* 4. 44. for Toll not paid the Writ was *Tolloneum asportavit & illud solvere recusavit*, the word (*asportavit*) is void, because surplusage; the Writ abates not, because he refused to pay, for that is sufficient, and be the Writ good or bad in Law, it shall stand in force untill it be Reversed by Error; because an ancient Record. 7 *H.* 6. 1. *Moyle*, Justice, if the Sheriff take a single Obligation for to let one to Mainprise, which is not Mainpernable, it was void, because he took it *colore officii*, which is taken alwaies in ill part, and implies that the thing is done by pretence of Office, but not yet duely; and their office is but a veil and shadow to falsity, *Virtute officii*, or *Ratione officii* taken in good part, because it is alwaies when the Office is just, which causeth the thing, and is pursuant to the office. Obligation is void when the condition is contrary to Law; as to be safe harmless if he kills a man, or doth commit treason

here the Obligation is void by the Common Law, ecause it was to save the Sheriff harmless for wrong one against the Law, as is the letting the Prisoner freedom, he being one which is not Bailable. 2 *H.* 4. 9. A Baily by *Withernam* takes the Beasts the Defendant, and afterwards re-delivers them the Defendant, upon Obligation given to him the Defendant, for the saving of him harmless, wherefore holden void; because it was to the Baily for this wrong in the re-delivery of e beasts to the party, for he ought to have detained them untill, *&c.* So here. And therefore the ligation void.

And afterward *Mollineux*, *Hales*, and *Brown* Justices, argued to the same purpose.

Montague, Chief Justice. It is likely to me at the Plaintiff shall be barred; for an Act which eneral in particularity, or particular in a general, which is all one, as in 13 *E.* 4. 8. That all rporations, and Licences made by *H.* 6. shall be d. So that all Bishops or Justices shall do such Act shall be pleaded; but a general Act which ends to every man, not, but the Justices ought ake Conusance thereof; but if this Act hath several branches concerning several matters (yet tained in one Chapter) there he needs not recall; but this onely which concerns him, and eth for his purpose: for every branch is a several Act by it self. But a Record shall not be plea (*inter alia*,) for it is intire upon one Original, and one Judgment upon it, but ought to d certainly all the Record when it is pleaded ar; because the Record is the matter of subce, and the effect of the Bar, which ought to lain and perfect; when the Record is but conance and induction to the Bar or Action, it is

ſufficient to recite this, which is the cauſe of t
Action, as 34 *H.* 6. 48. A Tenant by *El*
makes a vowry in *Replegiare*, for that he had e
ecution as Tenant by *Elegit*, and made a Leaſe r
ſerving Rent, for which being arear, he avow
he needed not ſhew the Record, becauſe the Le
onely is traverſable, and is the effect of the Avo
ry; and the execution by *Elegit*, is the Record fr
which it iſſues, which is nothing but conveyance
the effect; and therefore it ſufficeth to begin at t
Execution upon Damages recovered, without pl
ding how he brought his firſt Action, and wh
anſwer the Defendant made, or ſuch like. So
the 19 *H.* 6. 29. a Bill of Deceit againſt an A
torney, for imbeſſeling of a *Habeas Corpora* upo
Formedon between the Plaintiff and another, h
deth good, without ſhewing the Original and c
tainty of the Land, and all the Record in certai
becauſe the Record is but a conveyance to the
of Deceit; and therefore for this cauſe cannot
gainſaid; as to ſay *Nultiel Record*. But when
60. Record is pleaded in Bar, all ſhall be ſhewed c
tainly; and is Traverſeable there, in Concluſion
general Demurrer (as *petit judicium*) if the Pla
tiff ſhall maintain the Action, one ſhall have
vantage of all defaults, and of every thing me
oned in the Record, and of every point that
Law gives him. In Concluſion ſpeciall, of defa
onely alledged in certain, as here, *petit judici*
if the Plaintiff ſhall maintain the Action there
be void; for another cauſe than this which it is m
tioned, he ſhall not have benefit of this: of a th
void *ab initio*, as the Obligation here, bec
void by *Statute*; ſo in avoidance of a Deed, T
he was not a man lettered, and that it was re
him in another form. So 14 *H.* 8. 28. be
deli

elivered as an Escrow upon Condition, the Con-
usion shall be, so not his Deed, because the mat-
r proves that it was never his Deed of a thing
idable, where it was void after; because once it
as a Deed; the Conclusion shall be Judgment,
Action; because the duty is now extinct, as 1
7. 15. by release 35 *H.* 6. 18. for nonage 7 *E.*
5. by dures. When the Conclusion is naught,
d the matter in Law good, *Officium Judicis est*
to give Verdict against the Plaintiff, if it ap-
areth that he had not cause of Action, howbeit
at the Defendant hath lost the advantage thereof,
it is here. So 7 *E.* 4. 31. Trespasse against *B.*
d *C.* B. pleads not guilty. *C.* pleads the gift of
found guilty, and found for *C.* no judgment
the Plaintiff, because found against him. The
e in an appeal of a Woman for the death of her
ther, 10 *E.* 4. 7. because she shall not have an
peal of the death of any man, except her Hus-
nd; so likewise in trespasse against the Lord by
stresse where nothing is in arear; because the Sta-
te is *Non ideo puniatur dominus*, the Writs abate
officio, although the Defendant accepts them
od; for the Plaintiff shall be barred by the Court
officio, and shall not have judgment, although
e Defendant admits his Title; or by his Conclu-
n hath concluded himself of his advantage, if it
peareth that he had no Title.

The question in this case is, whether the obliga-
n be void by the Statute for the clearing whereof
must observe the same, having in it to that end
ree notable branches.

. The first branch is commanding and autho-
ng the Sheriff to let to Bail, persons manipernа-
by the Common Law, *viz.* persons taken by
tit, Bill, or Warrant upon an Action personall,

or indictment of Trespass; for it was (indiff
if they were guilty or not) made in affirmanc
the Common Law.

2. The second Branch, *viz.* The exception
also made in the affirmance of the Common L
before; for such persons which were in by cond
nation, execution, *Capias ut legat.* &c. were
bailable before.

3. The third is onely the purview, which rel
to the second branch as well as to the first; for
fore, refers to all this spoken of before, as
the thing excepted, as otherwise; as a Lease
years of a Mannor, except a Close, rendring R
the Lessee binds himself to perform all Covena
Grants, and Agreements, expressed or recited
the Indenture, and after disturbs the Lessor o
thing excepted, he hath forfeited the Obligati
because it is an Agreement; for when he accep
the Close, the other was contented with it, and
the Lessor should occupy it; and recited goes
the exception as to the rest. So in 45 *E.* 3. *fol.*
a Lease is made, and at the end thereof these wo
et ad omnia et singula in eodem scripto contenta,
word (*contenta*) (conteined, and recited) goe
every Covenant in the Indenture. An Act d
Colore officii, is extortion; as if an Officer t
more for Fees then he ought. And an Obliga
taken of a prisoner for meat and drink, is void,
cause it is *Colore officii*; for he nor the Plaintiff
not bound to give him sustenance: as he wh
distrains, is not bound to give food although he b
for Felony because 7 *H.* 4. 47. his go
are his untill he be attainted by the Comm
Law; which is confirmed by 1 *R.* 3. *c.* 3. *R*
Forfeit *fol.* 15. and if he dies for want
sustenance: it is his own fault; because th

esumption, his ill demeanor bringeth him to such
priſonment.

The *Statute* of R. 3. reſtrains all Sheriffs and o-
er Officers to take Obligations of their priſoners,
nly except the Warden of the *Fleet*, and the Kings
allace at *Weſtminſter*. A Sheriff lets to mainpriſe
ne taken by *Capias* upon an Indictment of Treſ-
aſs, which for the ſurety of the Sheriff makes an
bligation to a ſtranger to keep his day, is 7 *E.* 4. 5.
eld to be void; becauſe taken to another, and not
the Sheriff only, according to the *Statute*. Alſo
ere it is held, if the Obligation hath not the Con-
itions expreſſed in the *Statute*, That it is not the
eed of the party; *ex quo ſequitur*, that he ought to
nclude, not his Deed: keeping without dāmage
all be intended by the generalty for all things,
reaſons, Felonies, Accounts, and for all times;
nd I am of opinion that if any thing be added o-
er then what by the *Statute* ſhould be in the con-
ition, that then it ſhall make all void; as if a
ondition be made according to the *Statute*, in the
rſt part and hath another thing not according to
e *Statute* in the latter, it makes the whole void.
o to add other words in a Formedon, or Writ
f Waſte, which are given by *Statute*, all is void.
ote alien all the Land, when he hath licence
r part, the licence is void in all, by the *Sta-*
te of 32 *H.* 8. becauſe he hath exceeded the
uthority thereby given to him. The *Statute* 69.
ith, That the Sheriff ſhall let perſons mentio-
ed therein to bail upon reaſonable ſurety of ſuffi-
ent perſons in the plural number; and becauſe
ere is but one ſurety here, the Obligation is
oid. Alſo becauſe the *Statute* ſaith, That if it ſhall
e taken in any other manner then is contained in
e *Statute*, it ſhall be void. Alſo here by *Plow-*

den, yet taken by one at large by the words of the first branch, and those aid the third branch; for every person which extends to those at large, nor for any person in their Ward, which extends only to prisoners.

Kidwelly *against* Brand.

H. 4. *and* 5 E. 6. *In the Common Pleas.*

LEase for years rendring 40. s. Rent by the year at *H.* out of the Land at the Feast of *M.* and if the Rent be behind, and not paid by the space of 40. daies after the said Feast; then it shall be lawfull for him, *&c.* for to re-enter; the Reversion is granted for Life, the Grantee cometh to the Land 40 daies after *M.* to demand the Rent aforesaid, but demanded it not, and for not payment re-entred, and adjudged lawfull.

1. A Grantee for Life of a Reversion, is an assigne within the *Statute* of 32 *H.* 8. *c.* 34. to enter for a Condition broken.

2. The tender of the Rent on the Feast day is not requisite, nor until the last instant of the 40. day, although not so expressed in plaine words.

3. Notwithstanding that the Rent be appointed to be paid out of the Land at the Feast day, and not the 40. day by expresse words; yet it shall be so intended by relation to the place last named. And as to the demand of the rent.

No demand here is requisite; because that the Land which is Debter, is absent; the contrary is upon a general reservation; and if a Rent seek payable in a forraign County be demanded and denied there it is not a disseisen by *Plowden*, contrary upon the Land.

4. T

4. The place which was once charged with the payment in the hands of the Lessor, remains chargeable in the hands of any other, because he hath this as a Liberty and Authority imposed upon it by the Lessor, and such Liberty is saved by the *Statute* of suppression of Monasteries; and therefore the Lessor, nor the Lessee are not Trespassers, by their coming there to tender and receive the Rent.

Rosse *against* Pope.

ROs acknowledged a reconusance to *Pope*, and after levies a Fine to him of parcel of his Land and afterwards *Pope* sues Execution, and takes the body of the said *Rosse*, and he brings an *audita querela* in the Chancery, and adjudged that it lieth not. 72. 5 E. 6. In *Chancery upon an* Auditz querela.

1. For that the Land is not debter, but the person, and the Land is onely charged in respect of the person, and not otherwise, untill Execution sued, as if a Tenant chargeable to do fealty to his Lord, give his Land to the Lord, his person shall be discharged, and the services extinct by the unity of the possession.

2. For that the purchase was before Execution sued, otherwise it had been, if sued afterwards; for then the Land was charged in *facto*, and not chargeable. And if any part be discharged by act in Law, as discent, or act of the party, as Surrender, Feoffment, *&c.* Also it shall be discharged, because the duty is personall and entire.

3. Because that the Conusor shall not have contribution against the Feoffees, but they shall have against him; and here the Conusee shall not have Executi-

Execution against his Feoffees, for that they may not have contribution against him.

Wimbish *against* Willoughby.

73. Tr. 6 E. 6. *Assize against* L. Will. West. 2. *cap.* 25. *quia non est aliquod breve in cancellaria per quod querentes habent tam festinum remedium sicut per breve novæ disseisinæ.*

ASsize directed *Coronatoribus*, in *Lincoln*, upon the surmise of the Plaintiff that the Sheriff was his Cosen, and shewed also, That one of the Coroners was servant to the Defendant, and all judged good.

1. For the speedy expedition of the Assize, and the mischief of the Plaintiff, if it should be abated by the exception of the Defendant, and no mischief to the exceptor, and here the *venire facias* is awarded the first day, as in a *præcipe*.

2. *Coroners* in *Lincoln* shall be intended Coroners of *Lincoln*, for that they are the words of the King.

In the Argument of this case; see first where Writ Original shall be directed to the Coroners where not. Secondly, and when other Judicial proces. Thirdly, an exposition of the words (*a* and *de*) in Writs, Grants, or, *&c.* Fourthly; what words are sufficient to make a Grant or a Recharge. Fifthly, some matters touching challenges and where they shall be Traversed, *&c.*

Partridge *against* Strange and Croker.

78. 1. 6. & 7. 1. 6. *In the Common Bench.*

IN Debt the Plaintiff counts upon the *Statute* 32. *H.* 8. *cap.* 9. Of buying and selling of pretended Titles and Rights, and alleadged this to be done 28. *April*, 32. *H.* 8. where in truth is was

done this day; and that the Defendants have made a Leaſe for years of a houſe, and nine acres of Land pertaining to it, whereof they nor their anceſtors, nor any by which the claim were in poſſeſſion, Reverſion, or Remainder, nor took the Profits for one intire year before, *&c.* and holden.

1. That the *Statute* need not to be ſpecially recited and pleaded, becauſe it is general; but for that it is miſrecited, it is not good by the Court, *fol.* 84. and yet is ſurpluſage, and it ſhall prejudice the party in ſome caſes, *fol.* 29. as debt by *I. S.* Parſon of *D.* it is a good Traverſe, becauſe he is not Parſon; or that there is not ſuch a village called *D.* } no Ld.

2. When the Term ſhall not be certainly pleaded, for that it is Conveyance of the Action, and is not material here, and he which pleads it, is a ſtranger; as an Indictment of the death of a certain man unknown or the ſtealing of the goods of a certain man unknown.

3. That a Leaſe for years, or a grant of parcell of the Right is within the *Statute*; becauſe the *Statute* ſpeaketh of any right, and is not intended onely of an entire right, and that the entire value of the Land ſhall be forfeit by ſuch Leaſe, *per Curiam fol.* 87.

That this Leaſe made by one in poſſeſſion, is out of the *Statute*; for that it is not averred to be a pretenced right, by *Hales* and *Montague*, *fol.* 87. againſt *Cook*. For they mean that he which hath poſſeſſion one day, or however may make a Leaſe, or Feoffment *bona fide*, and ſhall be forth of the *Statute*, although that he hath not poſſeſſion, or taketh the profits one whole year without averment, that it is made for maintenance, & that the *Statute* ſhall

ſhall be intended onely of thoſe which makes Le-
ſes, *&c.* having but a right, and not the poſſeſſion
as *Montague* held, a promiſe by him which is out
poſſeſſion, to depart with the Land when he ſha
attain the poſſeſſion, is within the danger of t
Statute. fol. 88. And if the iſſue in Tail at full a
marry a woman diſcontinuee of his Father, a
maketh a Leaſe for years, this is within the *Statut*
for that he Leaſes his ancient right. So by *Morga*
if the heir releaſe to the Abator, and afterwar
claiming by diſcent, maketh a Leaſe for years, th
may be averred a pretenced right, and then
within the danger of the *Statute*, *fol.* 86. and
right is within the *Statute*, which comprehends a
rights.

Pretenced right is, where one hath the poſſeſſion
and another which is out of poſſeſſion claims th
or ſues for it, by *Mont. f.* 88.

Morgain, Serjeant for the Defendant. He whic
79. voucheth a Record, and vary in the year or Term
hath failed of his Record, So the *Statute* here, n
Act without the conſent of the King; when all a
ſent, it ſhall have relation to the firſt day of th
Parliament, and from that time is an Act of Par-
liament, unleſſe it be otherwiſe appointed when i
ſhall firſt take effect. An Act made in the firſt, o
ſecond Seſſion relates not but to the firſt day o
the ſame Seſſion. Miſ-recital ſhall prejudice th
party in ſome caſes; as Debt by *I. S.* Parſon of *D.*
where there is no ſuch Village *D.* a good Traverſe,
and abates the Writ; yet the naming of him Parſon,
ſurpluſage. So here becauſe it recites a *Statute* cer-
tain made ſuch a day, where it was not, although
that the day is ſurpluſage, it hath made the matter
vitious, although it be a general; becauſe the no
referring to the ſcience of the Judges, as he doth, i

ſaith generally *contra formam Stat.* &c. a *Statute* hath no words in vain.

Whidden, for the Plaintiff. A general *Statute* ſhall not be recited, as 27 *H.* 8. of Conveyance of the poſſeſſion to the Uſe, becauſe without recital the party may take advantage of the *Statute*. So the demandant may Demur without recital of the *Statute* of *W. c.* 39. If the Tenant vouches out of the line. So an Executor of an Executor ſhall have Account without recital of the *Statute* of 25 *E.* 3. *cap.* 5. So † 5 *H.* 7. 17. Information for Liveries, good, without reciting of the *Statute*, *cauſa ut ſupra.* H. 5. H. 7. *fol.* 17.

Miſ-recital of the ſurpluſage ſhall not make the matter bad, as 21 *H.* 6. 1. by *Newton*; if one as an Executor ſhall bring an action of Debt upon a Contract made to him; he ſhall not ſhew the Teſtament, for that the naming of him [*Executor*] is ſurpluſage. So 33 *H.* 6. 19. by *Danby* in Detinue againſt two as Executors; They ſhall not plead that another is Executor with them, becauſe they are not charged as Executors. But Detinue is cauſe of Action, and the naming of them Executors, is ſurpluſage. A man ſhall not aver that, which by the *Statute* is made apparant; as if the Lord ſhew that he entred into the Land within the year, becauſe his Tenant aliened to the Dean and Chapter, he ſhall not aver that it is *Mortmain*, becauſe it appeareth ſo; to be ſo here, it appeares that it is a preſenced right, becauſe he counts that the Defendant nor his Anceſtors, *&c.* were not in poſſeſſion the ſpace of a year before the Leaſe, and then it is preſenced, Conveyance to the Action (as the Leaſe is here) ſhall not be pleaded. So certainty is the ſubſtance it ſelf, as appeareth 34 *H.* 6. 6. 4. by *Priſot* in *decies tantum.* If the Plaintiff ſheweth ſuch part 33 H. 6. *fol.* 19.

of

of the Record as conveys him to his Action, i
ſufficient without ſhewing all. But a Writ jud
al ought to recite the Record certainly out of wh
it iſſueth; becauſe the Record is the ſubſtance a
effect there; and not only the Conveyance. A ſtra
ger to the Deed or thing, as the Plaintiff here
to the Leaſe that he pleads, ſhall not ſhew the c
tainty of it; as † 35 *H.* 6. 8. 13 *H.* 7. 19. By *Fi*
ux; an ancient Major in Treſpaſs juſtifies the t
king of goods in the time of Majoralty, becauſe t
Plaintiff was out-lawed, without ſhewing the *Pa*
tent, becauſe he is now as a ſtranger to them; for
belongeth to the ſucceſſor, and not to him. So
Wife ſhall have Dower for a Rent Charge grant
to the Husband without ſhewing the Deed. So
H. 6. 1. by *Strange*; Leſſee in Debt againſt him f
Rent reſerved, may ſay, That the Eſtate of his Le
ſor was upon Condition; for which broken, ſuch
one had entred before the Rent arear, Judgment,
Action, without ſhewing what condition.

See poſtea fol. 148.

Sanders, to the ſame intent. The *Statute* here
although penall, yet becauſe it is beneficial for th
Common-Wealth, *viz.* for to avoid maintenance,
ſubordination of witneſſes, *&c.* Things out of th
Words thereof ſhal be taken by the equity of it; an
though the words be obſcure, they ſhall be ex
pounded moſt ſtrong for the Common-wealth; an
words are but the image of the *Statute*, and the lif
thereof in the minds of the makers, and Expoſitor
of it, and which approach neareſt to their minds,
are the true Expoſitors; and words ſhould be in
clinable to the mind. So *W.* 2. *cap.* 1. *Fines* upon
Lands intailed *ipſo jure ſit nullus*, *viz.* as t
right to be bound; but as to the poſſeſſion, ti
a diſcontinuance. So the heir may demand the he
riſage

See ante fol. 57. at poſt 137.

ge of his Mother, alienated by his Father; if he ly Levied the Fine: Yet *Gloucester cap.* 3. saith, hereof no Fine is Levied) that is, lawful Fines by Father and Mother: So a *Statute* Marchant wills it shall be delivered to the Conusee: Yet 21 E. 1. wills that it shall be delivered to the extents, if they prise it too high; so goods appriſed at high a rate, be delivered to the praisors for the ce. So if the Plaintiff be nonsuit in a second deli- ance, the Defendant shall recover dammages by equity of 7 *H.* 8. 4. Return irrepleviſale shall be rded; and so by this meanes the Plaintiff is bar- and so the intent of the makers directs the rds and equity of *Statutes.* Leſſee for years h a Right, Eſtate, and Title to Ent r. 1. A right, auſe by *Bracton* he hath *jus utendi & fruendi in no libero Tenemento*; 2. An Eſtate, because a Re- inder in Fee is good upon a Leaſe for years, and Remainder is not good without an eſtate prece- nt; 3. Title, becauſe 7 *H.* 7. 11. a Termor may ſifie a faint Recovery againſt his Leſſor by the mmon Law, before the *Statute* of *Gloceſter* in *ſſione firma*, becauſe he was not a party. So 9. 6, 64. by *Strange*: I grant to *B.* That if Tenant for life dies, living my ſelf, that he ll have for 10. years, *B.* may maintain, becauſe hath colour, yet he hath nothing, and is in ubt if he ſhall have it for 10. years or not: Then he Leſſee for years hath ſuch intereſt, that by the mmon Law he may maintain, there is no need of emedy, for all other the *Statutes* before avoid intenance, the ſuit depending; for the *Statute* of *H.* 8. is made for the avoidance in medling with her mens matters before any ſuit or after. Account al not abate for default of form, if it hath ſubſtance *See poſt.* 3. *cap. ultimo.* If one be found guilty of one 190. offence

See poſt. 172.

53.

offence which is pardoned by Parliament, Ju
ought not to proceed to judgment; yet it is
pleaded, because they are bound to take notice
it; for it appeareth to them by judiciall knowle
26 H. 8. 7. by *Fitz*, *H.* but if *A.* kill *B.* in the
sence of the Justices, and *C.* is found guilty o
7 H. 4. 41. by *Tirwit* and *Gascoin*, the Justice ou
to respite judgment, because he knoweth the c
trary; but not to acquit *C.* because he cannot ju
of his own knowledge. 22 *E.* 4. 47. where it
granted by Parliament, That *A.* should ha
Writ with Proclamation, out of the Chanc
84. against one G. to answer divers trespasses wh
were contained in the Act of Parliament, and
Writ was abated by award; because it did not m
tion those Trespasses in certainty; and the Act
a private Act; and there the not recitall, or
recital, shall hurt.

And as to the certainty of the Term he shall
shew it, because he is a stranger to it. As the De
dant shall plead Joynt-tenancie of the Plai
without shewing of whose gift.

All the Court say, That Declarations ought
have certainty. So that the Defendant may k
See post. to what thing he ought to answer and 3 *H.* 12.
fol. 193. 3 *E.* 4. 21. In Debt for a sallary against a Suc
lor declares, That he was retained with his Pre
cessor, and shews not who retained him; becau
stranger may retain him; the Count shall abat
the better opinion for the incertainty; and
truth is, That it ought to be conjoyned to cert
tainty, as 9 *H.* 7. 3. by *Fineux*, and 6 *E.*
Debt upon payment at two days, whereof the
P. 20, H. 6. *fol.* 30. is come, abates by shewing of the Plaintiff the
because he hath shewed falsity. † So 20 *H.* 6.
one ought to reherse the *Stat.* upon which he

rth Champerty for to Warrant this certainty which
ught to appear alwaies to the Court; but not in
ne manner; as sometimes by the replication in
ssizes, sometimes by Verdict: As in *a quare impe-*
t the value of the Church. In Ward the value of
e Marriage, in Detinue the value of the goods;
s in 20 *H. 6. Champerty* was brought, which was P. 20. H. 6.
ot Warranted by any *Statute*; and there *Newton fol.* 30.
id, That if the party could not shew to them
me *Statute* by which it is Warranted, that they
ould award that the Writ should abate. And for
at which hath been said, that he needs not to re-
te the *Statute*: & therefore misrecital is not mate-
al; it seemed to them, That howbeit he need not,
et if he recites it, and there is none such, then he
th failed of his substance; for the Court will
ot ayd him, nor think he intendeth any other thing
en what he hath shewed; and this abundance
reciting more then needs, hurts the party many
mes. And therefore in 20 *H. 6. fol.* 42. contra- T. 20 H. 6.
to 8 *H. 6.* 33. *Fitz. H.* Count 15. of forging *fol.* 42.
false Deeds, the Writ was of *Diversa facta*, and
unimenta, &c. and he counted but of one onely,
nd by assent of all the Justices it was awarded,
hat the Writ should abate, and so abundance a-
ted the Writ.

And if one maketh Title in Assize in his plaint
ere he need not, yet if it be not formall, all shall
are; and yet it was abundance, and more then he
s compelled to do. So in the principal case. And
ere it was said, That the Defendants by their
emurrer have confessed such Act of Parliament
the plaintiff hath declared, they held, that ad-
itting this to be a confession, yet this binds not
e Court, which is a third person; as appears by Pa. 10. E. 4.
. 4. Wherein Trespasse of Cattle taken, *fol.* 7.

brought by the Leſſee for years; the Defendant ſaid, That the Leſſor held of him by Rent, which was Arear, and he took the beaſts for it, the Plaintiff ſaid nothing Arear; and there although the Defendant had admitted the Writ good, yet the opinion of the Juſtices was, That the Writ ſhould abate for that the Lord was Defendant. And ſo if the Defendant will admit good an appeal brought by the Wife of the death of her Father, yet the Court ought to abate it, † although the party affirm it, and a Demur is a Confeſſion of all matters in Fact but not of matters in Law. For by the Demurrer he puts it to the Judgment of the Court, and confeſſeth not the Law againſt himſelf, although the King may waive the Iſſue, and ſo Demur in Law and recover; and he hath many other prerogatives yet ſhall he be bound by miſrecitall, or by miſuſing or miſconceiving of his Action, and there the Writ ſhall abate where he is ſole party: as in the caſe of a common perſon: *à fortiori* where another is party with the King, as here; the Plaintiff ought to ſhew certainty of the Leaſe here, by *Cook*, by other Juſtices not.

85. † Mag. Cart. *cap.* 34. Nullus capiatur aut imprisonetur propter appell. fœminæ de morte alterius quàm viri ſui. *See* poſt. 236.

In *Decies tantum*, certainty of the Summ received muſt be ſhewed, becauſe elſe he ſhall not recover ten times as much, neither in Champerty, without ſhewing the certainty of the firſt plea, becauſe prior to the Record.

So in Treſpaſs, if the Defendant pleads *Franck Tenement*; the Plaintiff intitles himſelf by a Leaſe made by him; the Defendant will ſhew that he made a Feoffment, and that he entred for Forfeiture, he ought to ſhew the name of the Feoffee, and certainty of the Feoffment, becauſe he is a ſtranger to it, and in all caſes of privies, he ought to ſhew the certainty, as 2 *H.* 7. 6. in Bar of Dower, the Heir pleads

leaded detainer of evidences, he shall shew cer-
tainty, for he is privy to them in that he affirms
them to appertain to him; of a bag sealed with
Charters he needs not to shew the certainty, 18 *H.* 8.
. because the bag sealed is certain. Indictment
injustam ignoti, good. *Stamford fol.* 95. by the *Sta-*
tute that is penal here nothing taken by its equity
y all the Justices, as an *Attaint* shall not 14 *H.* 7.
3. nor the *Statute* which augments bread by evil
making, nor things out of the words shall not be ta-
en by equity. But the words may be expounded
eneficially, as Treason by the *Statute*, 25 *E.* 3. for
illing of a Master, so of a Mistris, are of one effect,
9 *H.* 6. 47. but not by equity, but rather within
ords. Plural number contains singular, by *Hales*.
o here pretenced Rights and Titles shall be
unished as the *Statute* of forging false Deeds, speaks
the, plurall, 1 *H.* 5. *cap.* 3. yet he that forges
e false deed shall be punished. So for Entry into
e Tenement; yet 5 *R.* 2. *cap.* 7. speaks of Entry
to Tenements, under this word [any] the lesser
state is contained in the greater, as 23 *H.* 6. 10.
ohibits that a Sheriff shall Lease his County to
m in any manner, then he shall not Lease part
ereof, by *Hales*. This Lease here made by one in
ssession, is out of the *Statute*, because it is not a-
ered to be a pretenced right, *viz.* the bargain and
ase to be made for maintenance (contrary *Cook*)
r this was the point of the *Statute* as 9 *H.* 6. 26.
t the *Statute* is in the Copulative, for forging and
blishing this is within the *Statute*, but still it ought
be averred, That it was publisht to trouble the
ssession and Title of the Plaintiff, for this is the
int of the *Statute*. So here the Lease ought to
averred for maintenance, for this is the point of
t *Statute*.

vide post. 129.

See post. fol. 124.

Montague, Chief Justice. He that is in possession, may buy the pretenced right of another; but he which is out of possession, if he promise or bargain to depart with the Land when he shall get the possession, this is within the *Statute*, and maketh it void by the Common Law; wherefore the *Statute* affirms it, and adds a greater pain to the thing done against the Common Law; and the *Statute* shall be meant to avoid a bargain of Right, when one of possession; he which hath possession but one hour, alwaies may sell, or it shall be a hard Exposition.

And some things may be expounded against the words of the *Statute*, because Law and Reason allows it. As Tenant, hanging a *Precipe*, Infeoffs his Son and Heir, *6 E. 3. fol.* 274. contrary to the words of *Articuli super Chartas*, *cap.* 2. where the Son may not maintain to the Father, but is bound to aid his Father. So an Heir may abet his Mother to bring an appeal; as *W. 2. cap.* 12. So Trespasse in a Park without hunting, shall not be punished: these words (by a year before) refer the Clause before onely; so that the Clause (being in possession, Reversion, or Remainder) they are absolute, *viz.* if he were in possession for one hour onely, it sufficeth, and there he may alien without danger of the *Statute*, and here no offence is shewed to be made against the *Statute*.

See post fol. 204.

Pollard

Pollards *Assise of Freshforce.*

AN Assise of Freshforce upon a plaint of Intrusion, or of Novell Disseisen, was brought by *John Pollard* Esquire, and *Mary* his Wife, in the *Hustings* of the *Guild-Hall London*, against *Bartholomew Jekell*, *Ralph Foxly*, and *Anne* his Wife, and eleven others. 10. of them appear by Baily, and plead *nulliel in rerum natura*, as one named in the Writ; this shall abate but for him onely, and shall stand good for the others. It was adjudged so in the *quare impedit* against the Bishop of *Carlile*, and many others; where the death of one of the Defendants was pleaded by abatement for speed in avoiding of delays therein. For voucher lyeth not in it, unlesse the party himself be present in Court, and Protection lyeth not, because excepted in an Assise; therefore it sufficeth, if Tenant and Disseisor relinquish; and the Land is the chief and Originall cause of the Action, otherwise in Trespasse, for there the person is chief; and the death of one shall abate the whole Writ, by 29 Ass. *fol.* 62. adjudged; but the contrary was held, 44 *E.* 3. 18. 47 *E.* 3. 18. And upon the whole matter the judgment was, that the Plaintiff shall recover.

7 *E.* 6. *In the Guild-Hall London, in the Hustings in time of Lent.* 90.

The Parſon of Honylanes Caſe.

7 E. 6. Panel *Parſon againſt* Moore *and the Mercers of* London.

AN Aſſiſe of Freſh force againſt *Moore*, a Corporation. The Corporation may appear by Baily without Warrant, for that is to defend their wrong; otherwiſe it is juſtifie a Treſpaſſe, which is but a perſonal thing. And although the Aſſiſe *Pone per vadios, & ſolvos plegios prædict. Defend. Ballivum ſuum ſi ipſe inventus non fuerit* generally, yet he ſhall be intended a Lawful Baily by Warrant. And the Defendant pleaded that the Plaintiff hath entred after the continuance, and Iſſue taken thereupon, the Jury gave a ſpeciall Verdict, That he entred for to ſee the antiquity of the buildings at the requeſt of the Defendant, which had invited him to dinner, and adjudged no entry to abate the Writ; for that if he were a ſtranger, he ſhould not be a Treſpaſſer by this, becauſe of the requeſt, becauſe he had not an intent to enter, and continue in poſſeſſion.

The Jury may give a ſpeciall Verdict, and find the matter at large, upon every iſſue by equity of the *Statute* of *Weſtminſter*, 2 *cap.* 30 it this tends to prove the part of the Iſſue only *per curiam*. And upon the whole matter judgment was given upon the ſpeciall Verdict that the Plaintiff ſhould recover.

Woodlan

Woodland *against* Mantle, *and* Redsole.

THe Lord incroacheth services of another nature, and avow for this. The Tenure shall be Traversed and not the Seisen: otherwise it is if he encroach more of the same nature; as where he holdeth by 12. d. to encroach 2. s. *&c.* There the seisen shall be traversed; for the quality of the Tenure is traversable, and not the quantity. But to avoid the incroachment of the quantity, the tenant is put to a Writ of Customs and Services, or *contra formam Feoffamenti*; and this is Estoppell between true Lord and Tenant one in Replevin, and the Tenant may make Seisons, if he Distrains for this incroachment. And the Lord may not make Title in Assise for this incroachment. 94. 5. *and* 6. E. 6. *Replevin.*

And also this encroachment is intendable onely between true Lord, and true Tenant, and not Donor and Donee, Lessor and Lessee; for there they ought to avow upon the Reservation, which the Tenants may Traverse, notwithstanding the encroachment, by *Plowden.*

The Lord may Seise or Distrain for *Heriot* Service, adjudged; because he hath property in this by the death of his Tenant, and the certainty thereof appeareth by 6 *E.* 3. 177.

IF one be present, and abet a Murtherer, he principall as well as he that kils the man, shall be indicted although that the Murtherer fl and be not attainted, because both are principals the first and same degree. And he which abets not onely principall in the second degree, but one be Indicted as accessary to two, he shall be arraigned with the abettor, untill he which fl is also attainted, and adjudged, which agreeth w 40 Ass. 25 7 *H.* 4. 29. and 36 *b.* And if t abettor be found guilty by one Verdict, and t Murtherer by another Verdict, is acquitted; a Judgment shall be respited against the abettor for the Court will give more credit to the Verdi which was charged directly upon the principal a then another which is charged implicitely and o liquely.

Vane, Salisbury, *and Doctor* Ellis,

1 Mar. *at the same Sessions.*

FIve were Indicted of Murther of a Servant Doctor *Ellis's*, and one *venire facias* award against all, and they severed in peremptory Challenges; yet the Jurors which were challenged, sh be drawn against all upon the challenge of one, although that the others challenge him not, but allow him.

1. Adjudged, for that the *venire facias* is intire that the Court in discretion at the prayer of the Attorney of the King, may sever the Jury and Ta thereupon.

2. Th

2. They may make one Jury serve severally against every of them by himself.

3. The evidence given against the prisoners prove, That the Servant was killed upon malice prepensed to Doctor *Ellis* himself, which was in company at the time of the Murther. And the Court resolved, That this Malice to the Master, extends to the Servant, and all others which defend the Master, and resist the malice of the Murtherers.

4. Resolved also, That if two are fighting of malice prepensed, and a stranger which hath no malice takes part with the one, and kills the other, this is Manslaughter in him, and Murther in the other.

5. Resolved, if one be indicted of Murther, and found guilty of Manslaughter, and acquitted of the Murther, yet Judgment shall be given against him that he shall be hanged; for that the death of a man, which is the substance, is found, although that the circumstance is not, yet he was reprieved by the discretion of the Justices.

Fulmerston *against* Steward.

PLeading that the Masters and confreres of a Colledge was seized in fee, is good without saying, In the right of the Colledge; for it shall be intended, for that they are named by the name of Corporation; otherwise it is, if they were named by their particular names. M. 1. *and* 2. P. Mar. *in the Kings Bench in trespass.*

2. If one plead a Lease of a Mannor, with an exception made to the defendant, and will avoid it for parcel of the Mannor, because of another Lease made to the first Lessee, within a year after 102.

the

the making of the *Statute* of 31 *H.* 8. *cap.* 13. ought to aver in pleading, that the exception extends not to this parcel; For otherwiſe it ſhall intend ſtrongeſt againſt him that pleads it, and that paſs not to the firſt, nor cannot paſſe by the ſecond
103. Leaſe, for that is ſeverred for the time by 38 *H.* *fol.* 38. That a thing in poſſeſſion may not be parcel or appendant to a thing in Reverſion, as a Leaſe for life of a Mannor, except the ſervices of *I. S.* it is not parcel of the Mannor, But is a *ſignio* in groſs, and the Land ſhall be demanded at the common Law, and not in the Court of the Lord (*Bromely*). But here (*quære*) if the acceptance of the ſecond Leaſe be a ſurrender of the firſt, and the ſeverance by the ſecond Leaſe, and then the ſeverance by the exception is determined; and ſo the Mannor paſſes entire, as it was at the commencement.

no 1. 3. If the recitall of one part of the *Statute*, which maketh for him which recites it, be ſufficient.

4. If the pleading of a ſurrender or grant to the King, by deed inrolled generally, without ſhewing of the enrollment ſpecially, be good.

5. The King is ſeiſed *Jure Coronæ*, of Lands comming to him, by the diſſolution of Monaſteries, the Tenant pleads a Leaſe for fifty years in Being and after by his rejoynder pleads, that the ſaid Leaſe is made good for twenty one years by the
31 H. 8. *Statute* of 31 *H.* 8. this is a departure, for that the eſtate cometh after the Leaſe; otherwiſe it is of a thing pleaded in affirmance of the Bar, which precedes it.

6. That the ſecond Leaſe made by an Abbot within the yeer of the making of the *Statute* of 31 *H.* 8. to one which hath a Leaſe for years of it before, without the reſervation of the Ancient Rent

hen it ſhall be good for twenty one years only rom the making of the ſecond Leaſe *per cu-*

Bromley, The Leſſee for years accepts of a new eaſe within one year after the making of the *Sta-ute* of 31 *H.* 8. *cap.* 13. Admitting this ſecond eaſe to be good by the ſame *Statute*; yet it is a ood ſurrender of the firſt Leaſe, for that the ſe-ond Leaſe was once good, and ſhall be expound-d to be void by the *Statute*, as to the King after the and comes to the Kings hands, and not *ab initio*; nd ſo he ſhall not avoid the operation of the Com-on Law in the Surrender; for by the Common aw, the taking of a ſecond Leaſe, is a ſurrender f the firſt; for both Eſtates may not be in one and he ſame perſon, at one and the ſame time; For if he Leſſee for fourty years taketh a new Leaſe for wenty years, upon condition that it ſhall be void he doth not ſuch an Act; the condition broken, oids the ſecond Leaſe; But not with ſuch relati-n, that it ſhall take away the Surrender of fourty ears, becauſe it was once executed abſolutely. So a Recovery is had of Land, the which is after-ards reverſed by error, which avoids the recove-y, yet it doth not ſo avoid it, that the Recoveror hall be puniſhed by Treſpaſſe for the iſſues taken the mean time; two points upon the *Statute* ere; firſt the ſecond Leaſe is not made void by the 108.
rſt branch of the *Statute*, but that at the time of the cond Leaſe made, the firſt Leaſe hath his conti-uance; and the *Statute* is in the copulative, and hen it is not determined by the making of the ſe-nd Leaſe, which then had his continuance, and hen was not determined, finiſhed, or ex-ired according to the words of the *Statute*. econdly, the ſecond Leaſe for fifty years, is abridg-

ed

ed to one and twenty years, by the second bran
for contrary to equity, it will destroy the for
Lease and the second also; And so, that the s
Lease exceeds not twenty one years expressed in t
Statute which extends to the terme abridged,
not to the intire new term to make the clause co
ditional, but to make the Estate abridged, good
one and twenty years, and shall be as a doub
repetition of the first clause only, and be also
declaration of the State, and expounded in the
ture tense, that it shall not exceed twenty one ye
which is all one with the words, for twenty
109. years; as in a writ to the Sheriff, to seiz goo
for the King, *Ita quod nullus ad ea manum appon*
And in the *Statute* of Gifts conditionall, *Ita qu*
non habeat potestatem alienandi. The word (So)
not conditional, but maketh a plain declaration
the thing before, by the words of the *Statute* so
See the Statute de proditionibus, 25 *E.* 6 *cap.* 16. times expounded contrary to the text, to m
this agree with reason, as by 25 *E.* 3. *cap.* 16.
ter *fol.* 205. by the exception of non-tenure of p
cel, no Writ shall abate but for the quantity of n
tenure which is alledged, expounded by 5 *H.* 7.
where the thing demanded is severall, as Ac
for in a *precipe* of a Mannor, if the Tenant ple
non-Tenure of parcel, all the Writ shall abate,
cause an intire thing, and there the demand
ought to have an exception in the Writ, because
is contrary to reason that a man shall demand t
intire mannor against one which is not Tena
but of parcel of that which he endeavors to reco
So *Prærogativa Regis* is for the Tenure of hi
See post. 204. *capite*, where the King shall have Primer seisen
all his other Lands; yet 30 *H.* 8. for *Soccage in*
pite, he shall not have, because it is contrary
110. reason that such a small Tenure should be
gre

...ely charged. So *W.* 2. *cap.* 21. gives entry to ... Heir, yet he shall not have the arrerages in the ... of his Father, old *natura brevium* 138. and this ... position is contrary to the text, because the text is ...trary to reason, to give an action to the Heir for ...hing in consideration of another thing not due to ...m. So *Glouc. cap.* 3. for warranty with assets, ... *H.* 7. 10. & 11 *H.* 4. 21. the things taken by ...ity are expounded contrary to the principall ...rveyance, *Instans est unum indivisibile in tempore ...d non est tempus nec pars temporis, ad quod tamen ...tes temporis copulantur.* *Old.* nat. bre. 138.

Townsends *Case*.

A Woman Tenant in tayle taketh Husband who maketh a Feoffment in 29 *H.* 8. to the use of himselfe and his Wife for their lives, the remainder ...er, the Wife is not remitted, Adjudged. 111.

1. For that she cannot avoid the discontinuance ...entry, as she might after 32 *H.* 8 *cap.* 28. but ...th an action (*viz*) *cui in vita* given to her to ...continue the possession, which she useth not, but ...meth to the possession by another mean, whereas ...e ought to take it in such order, and with such ap...ndances as the Law limits to such mean, and the ...an which she useth here is 27 *H.* 8. and as the *Statute* appoints the possession to her, she shall be ...judged in, and not otherwise, although she be a ...me Covert: For Coverture or Infancy is not ...teriall here, for it is not excepted in the *Statute*, And the *Statute* of 27 *H.* 8. of uses in ...e first branch of it, executes the possession ...cording to the quantity of the State in use, ...d the quantity of the State in use was for the ...rm of the life of the Husband and Wife; *ergo* the

Estate

Estate executed by the *Statute*, shall be to the
so for their lives according to the use aforesaid
second branch of the *Statute* executes the posse
according to the quality of the Estate in use,
the quality and manner of this Estate was by
chase, for they shall be purchasers of the
therefore she shall have the Land as a new purch
and in no other manner: for the words Affirma
in the Estate includes a Negative, for that w
the *Statute* appoints or limits order or form by w
affirmative in things which could not be by
Common Law before, so where the *Statute* inclu
a Negative, they shall not be in any other man
then the *Statute* appoints, as execution of uses he
by, 27 *H.* 8. and of voucher, as if he were Ten
by *W.* 2. *cap.* 4. 14 *H.* 7. 17. and entry for for
ture by Jointures, by 11 *H.* 7 *cap.* 20. but contra
and its words in the Negative, *viz.* and not ab
twenty one years, and the continuance of the St
shall not alter the possession in other degree then
continuance made it at first, where the entry is
ken away; contrary it is, where the entry is lawf
as if the disseisor maketh a Feoffment to the use
the disseisee, and is in possession by 27 *H.* 8. th
by his entry he is remitted, but the entry shall
adjudged in respect of the disseizin, and by that
shall be adjudged, remitted, and not by possessi
transferred by the *Statute*.

See post. fol. 206.
See ante fol. 56.

3. The Wife here is not remitted, because
Statute of 27 *H.* 8. executes the possessions of
remitter, *&c.* And if it should be a remitter,
remainder shall be defeated and void thereby, co
trary to the words of the *Statute*. And althou
that by the Feoffment, the freehold passeth to
Wife, and she remains Tenant thereof after
death of her Husband, and is Tenant to the Pra

stranger untill her disagreement or disclaimer; she may use her action against him in the remainder, which is a disagreement in Law, to the land possession conveyed by means thereof, and in the possession vests in the next remainder, as if the Wife had not been named, or had been a dead person in Law. So if it were to the use of the Wife for life, if she refuse it, she may use her Action of *Cui vita* against the Feoffor or his Heir; for by her shall they are Tenants to her Action, and the use rests to the Feoffor or his Heir; for upon a Feoffment to the use of one which refuses, which is as the use as a dead person, or of the thing insensible *Paul's Steeple*, there wanteth considerations, and the Feoffment shall be to the use of the Feoffor: and by using of her Action she may purge the remembrance by her Husband; and so no inconvenience, if she were not remitted as was objected. Not a remitter as the case here is, if the Estate had been made by immediate Feoffment, because the Husband survives the Wife, she is Tenant to the Action of the Heir of the Wife: and therefore in 11 *E.* 3. 26. & Ass. 2. that the Heir in like case entred upon the Husband, bringeth an Assise, and good, Law now by *Brook*, Remitter, 41.

The Earle of Darby *against* Newdigate.

THe Earle challenges the Array of the Pannel, because that he is a Peer of the Realm, and no Knight is named in it, and adjudged a good challenge according to 13 *E.* 3. *Fit. H.* Title *Assise. Challenge* 115. *Challenge* by the Bishop of *Exeter* taken in *Quare Impedit*, because he had not a Knight named in the Pannel, and it was allowed.

2. Ma. *in the Com-mon pleas*

Buckly

Buckly *against* Rice Thomas.

M. 2. Mar. *in Debt.*

DEbt upon the *Statute* of 23 *H.* 6. by [illegible] Knight, against *Rice Thomas*, the Pla[illegible] counts, that although he was returned a Knigh[illegible] the Parliament in a County in *Wales*, whereof t[illegible] defendant was Sheriff, by the greatest numbe[illegible] Freeholders of the County; yet the Defendant [illegible] turned not it, But that another was chosen Knig[illegible] and recites how by the *Statute* of 27 *H.* 8. *Wales* [illegible] incorporated and annexed, and made parcel [illegible] *England*, and the Welch Nation by this enabled [illegible] made inheritable to all liberties, franchises, rig[illegible] priviledges, and laws of *England*, as other the [illegible] jects of the King of *England* had, and adjudged t[illegible] he should recover.

1. For that the allegation alleadged under [illegible] [*licet*] is a precise affirmative by the Rules of g[illegible] authority; the Latine Authors by the Regist[illegible] and opinion of Doctors of the Civil Law, [illegible] *Brook*.

2. That the Plaintiff need not to shew the nu[illegible] ber of choosers in certain, for the infiniteness of [illegible] and for the impossibility that he should take not[illegible] of it.

23 H. 6.

3. That the penalty of the *Statute* of 23 *H.* [illegible] for false returns of Sheriffs upon election of Knig[illegible] of the Parliament, and all other Laws of t[illegible] Realm, extends to the Welch Nation, by the l[illegible] clause of the *Statute* of 27 *H.* 8. which enab[illegible]

27 H. 8. ult. clau.

them to it, and not by the generall words of th[illegible] which makes it parcell of *England*.

The most voices in the upper house shall [illegible] numbered by the Clerk of the house; for every [illegible] the

here shall be severally demanded; Otherwise in the Commons house; for there the assent is tried by the voice and are all at one time; So in Election of Coroners, *fol.* 126. *a.*

Stamford, Justice. Declarations ought to contain the materiall points by apt words of affirmation, and not by recitall, or implication; As by debt upon an obligation, it appeareth by the obligation, that the Defendant stands bound to the Plaintiff in ten pound, the which he hath not paid. So upon an escape by which the Plaintiff was excluded from his debt, is not good, because he saith not that for the matter in fact he was not satisfied when the prisoner escaped. So 38 *H.* 6. 14. for debt for a salary he must declare that he was reteined to serve in all occupations: the defendant shall have his Law; albeit that the generalty imply husbandry, in which Law lieth not, because it was not expressed plainly, but by implication, that he was retained in husbandry. The Law of *England* prays aide of other faculties and Sciences in matters appending to it; as of Grammer for the exposition of Latin words, as of a *renuntiavit toti Communiæ* 9 *H.* 6. 3. adjudged *imaginavit* which was amended in the writ, because no such Latin, 9 *H.* 6. 33. So of *Pensoffs* 11 *H.* 6. 2. 9 *H.* 7. 16. of Latin for fine Gold by Sanders, *fol.* 125. 7 *H.* 6. 11. aide of the Civil Law for difference of *Compulsion precisa & causativa* 1 *H.* 7. 35. of Surgeons for maihem of the Canon Law, 20 *H.* 6. 25. Of vigor of an appeal pleaded against an excommunication, the usual form shall be observed and good, as in debt, when the defendant acknowledgeth himself to be bound, *&c.* So in forgery against one only *quod falsâ conspiratione habita*, good 21 *H.* 6. 2. because the usual form, where 122. 11 H. 6. 123.

a man may not have by common intendment precise notice of the certainty of a thing; it sufficeth to alleadge this generally, as 21 *H.* 6. 9. & 9 *H.* 15. That executors have administred to *B.* without shewing what things they have administred of good, because he may not know that another has administred, and that he is not privy. So 5 *E.* 4. One obleiged to discharge the Sheriff of all things touching his office, he said that he had discharged him generally, good; because for the infiniteness of it. *Talbot* and *Corbets* case *tempore H.* 7. upon the same *Statute* 23 *H.* 6. where the issue was joyned that *Corbet* was chosen Knight for the Parliament, and he was admitted to prove it, *&c.* So 4. 19. To say he was imprisoned to make an obligation to the defendant, and to others unknown without naming them, good; contrary in false imprisonment. So 10 *E.* 4. 19. one bound for to serve in all lawfull commands, he said that he had served him lawfully, untill such a day without shewing what, and 'twas adjudged good. So in 12 *E.* 4. 14. he had found him meat, drink and apparel, untill one and twenty years without shewing what good. So *monstraverunt homines* without shewing the number, because a great number; for the Law compels not to shew the certainty of the thing which is not to be known or remembred, *Brook* Justice *fol.* 128. and in Parliament, the most voices in the upper house, shall be numbred by the Clerk of the house, for every one there shall be severally demanded; otherwise it is in the house of Commons, for there the assent is tryed by voices sounding all at one time; So in election of Coroners *Sanders fol.* 126. the County of Chester was wayes parcel of the Realm of England; yet Knights and Burgesses came not from thence untill the

Law of 34 & 35 *H.* 8. *cap.* 13. *Statute* penall extends not further then the words, and namely for to punish others, as 21 *H.* 7. 21. of malefactors in Parks extends not to Forrests. So 13 *H.* 6. *cap.* 10. that Sheriffs shall not let their Countyes, extends not to him which Leases parcel of it, 21 *H.* 7. 36. the contrary was held 20 *H.* 7. 12. and before *fol.* 87. So treble dammages for a forcible entry in an Assise or tresp̃as extends not to entry in the nature of an Assise 7 *H.* 4. which limit order for the election of Knights, extended not to the false return of the Sheriff, untill 11 *H.* 4. was made; if *London* inlarge the Ancient custome (*viz.*) that a villen shall not be drawn out, which hath remained there a year and a day, because Ancient demeanśne 7 *H.* 6. 2. extends not to enlargement. So *England* altered not the subjection of *Wales*. Rape is made felony by *W.* 2. *cap.* 34. Abetters thereof inquirable *cap.* 12. and at one time, good 2 *E.* 2. 22. 3. yet Chapter the 12. seemes to be intended of fellons before made, and not by the same *Statute*. 124. *See* ante *fol.* 87.

Sanders justice; the allegation alledged under 125.
he (*viz.*) is a plain precise and effectuall affirmation in deed proved by Rules in grammer, the authority of Latine Authors by the Register 66. 80. *natura brevium* 63. 134. *b.* 135. *b.* and the opinion of the Doctors of the Civill Law 21 *E.* 4. 49. and after *fol.* 143. by *Catlin* an Abbot in discharge Polydore Virgil. 19. et Fortescue de laudibus legum Ang. *c.* 42. *fol.* 54. et *cap* 21. *fol.* 36.
be Collector saith *inter Recorda* of such a term
tinetur that *R.* 2. had granted to his predecessors,
at he nor his successors shall be collectors, and
ught; for it may be contained amongst the Re-
rds, and yet no Record; escuage was first invent-
to suppresse the *Welch* and *Scots* rebels against 126.
hom war was made by the King of *England*, as

againſt Rebels, and not as againſt enemies, for the they were ſubject to *England* H. 3. made E. 1. his eldeſt ſon Prince of *Wales*; and ſo it hath continued to this time; which Act of H. 3. was the firſt alteration of *Wales*. King E. 1. made the *Statute of Snowdon*, which was the ſecond alteration of Wales. The third was the *Statute* of 27 H. 8. the *Welch* may ſue by 23. H. 6. *quod ei deforceat* in the nature of what action they will: *Statutes* ſometimes explain the Common Law, *Merton cap.* 2. *quod vidua legare poſſint bladà*, &c. and late *Statutes* aide by equity *Statutes* made before; ſo lineal warranty Bar not the iſſue in taile without aſſets by the equity of *Glocester* made long before, ſo land delivered in execution by the *Statute* of *Merchants*, 13 E. 1. ſhall be delivered alſo to high extendors, if they value it too high, although 13 E. 1. ſpeaketh not of it by equity of *Acton Burnel*, 11 E. 1. *cap.* which giveth goods priſed at too high prices to the praiſor, and that the Conuſee ſhall have them for the price, becauſe it intended to aide things, in like degree, although not *in eſſe* then.

Stat. *of* Snowdon, *when made*

Brown, Juſtice to the ſame purpoſe, and ſaid, that in things touching Grammer, their predeceſſors have conſulted with Grammarians, and purſued their Rules, as it appeareth in our books, that the Judges have ſaid *proximo antecedenti fiet Relatio* the which ſentence they might take out of Grammar, and he argued that (*licet*) was a plain affirmative, and that the matter contained under the (*licet*) is an affirmation with greater vehemency then it ſhould be without the (*licet*) and that the *licet* augments the affirmation. And he argued further that the generall words of the *Statute* of 27 H. 8. enabled the Plainff to take benefit of the

penalty

penalty, and in what he said agreed with *Sanders* in effect.

Brook chief Justice. *Gavel*-kind commenced by the *Brittans*, by partition of *England*, *Scotland*, and *Wales*, between the three sons of *Brute* continued by *Bellinus*, *Brennus*, *Ferrex* and *Porrex*, and was altered in *England* by the conquest of the *Saxons*, and the eldest son by their Law was inheritable. But *Gavel*-kind continued in *Wales*, until 27 *H.* 8. for it was not conquered till then, whereupon followed certain priviledges within certain precincts or Dominions, but not the enlargement of the place. So 38 *H.* 6. 10. Liberties granted to the Bishop of *Durham* in *feodis suis* extends not to the purchase after. So 21 *H.* 6. Warren is granted to *B.* in all his Lands in Dale, and he purchaseth other Land in Dale, he shall not have Warren there. So a grant of Conusans of Pleas of a thing parcel of the manor of Dale tenancy Escheats, afterwards he shall not have of it. For the Grant taketh execution of his precinct, and circuit, at the time of the making of it, and the services shall be then parcell of the mannor, and not the demeans which now eschear. So grant *Wreck* to *B.* in all his Lands, it shall not extend to the Land of which he was then disseised, because not his but the disseisors *pro tempore*. Reference to another thing shall be as this, to which it is referred, As if a man make a Lease for so many years as *I.* S. hath in the mannor of *D.* there he shall have so many years as *I.* S. hath, and shall take averment that *I.* S. had so many. And so it is if one grant tale *corodium quale* I. S. *super habuit*. So 11 *H.* 4. & 20 *H.* 7. grant is made of an office taking such fee as *I.* S. which executed the same before had, there it ought to be shewed what he had. So 20 *E.* 3. the King granted to *I.* 129.

all such liberties, that the Town of *N.* had: in the case by shewing of the records or writings, they prove their liberties, the grantee shall have the like.

Browning *against* Beeston.

131 3. Mar. *in ba.* Roy. Trespasse.

LEase for years by Identure, by which the Lesse Covenants and grants to render and pay for that land, thirty seven pound yearly, at two feasts of the year, naming them, or within two moneths after at a certain place out of the Land; and moreover Covenants and grants, if the said rent and farm of thirty seven pounds be areare and not paid at the time limited without any demand of the Lessor, then the Lease shall be utterly void, extinct, and of no effect; and that it shall be lawfull for the lessor to re-enter; and after the rent was not paid, and before the entry, the lessor maketh a new Lease, and the first Lessee bringeth trespasse against the second Lesee, and he pleads the matter aforesaid, and pleads the condition in this manner as in the Indenture is contained, and saith not precisely, that the Lessee had Covenanted as aforesaid. And also said, that the Rent was arear by the space of two moneths next after the said feast, and adjudged for the Plaintiff for these two causes only.

1. That the pleading of the Covenant, which is contained in the Indenture, that the first Lessee hath covenanted, is not but a recitall, and no expresse averment, that he hath made such a Covenant *in facto fol.* 143. by *Bromly.*

2. Because that the pleading of the Rent areare for two moneths, varies from the Indenture, which is after two moneths; *fol.* 143 *b.* by all contrary to

Catlin,

atlin, for he said, that this is to be intended so if
ecessity.

Matters in Law are left at large, but the better Ramsy.
pinion was for the Defendant.

If this Covenant and grant of the Lessee to pay
irty seven pounds yearly, by a reservation of
he Rent or not, and by *Ramsey*, it is not. *See* post.

1. For that it is not issuing out of the Land *fol.* 132.
y the way of Charge; for *pro terra* implies a
use of the grant, and so is not words to Charge
e Land, neither is there a clause of Di-
ress.

2. It is not a Rent service for default of words
f reservation of the lessor, as *reddendum*, *reservan-*
um, *tenendum*, &c. for this commences by words of
e Lessee, and which amounts not to a sum in
oss, because it goeth not with the reversion, as
which hath Land on the part of the mother, ma-
th a Lease for years by Indenture; the Lessee
ovenants and grants to pay to him and his heirs
enty shillings Rent, the Lessor dies without issue;
e heir on the part of the Mother, shall have the
version; and on the part of the Father, the Rent,
r that it is a summe in gross, and not a Rent inci-
ent to the reversion.

3. It is not Farm, because it is not a Rent, be- Gloces. *cap.* 4.
use they are all one.

4. It is a void condition, if it be a condition, be-
use it refers to the farm and Rent, where there is
r any such, as a condition that the Feoffee shall
feoffe a Corporation, which is not; or his Wife,
void, because the first is impossible, and the other
gainst Law; but the state, because it is precedent
defeasance of which they are made, shall stand
ood.

Stamford and *Walsh* Justices. It is a Rent; first this 134

this Covenant and grant is equivalent to reserv
on, and is by Indenture, in which the words are t
words of both, and taken for the words of h
which most aptly speaks them, as a Rent upon a F
offment, *Litl.* 47. is a grant of the Feoffee, and
Judgment of Law shall dispose words which ha
substance, formality, and words there shall be tak
indifferently; For all parties assent, and are pri
to the speaking of them. But words of a deed p
shall be taken more available to the grantee,
H. 7. 8. by *Brian*, and many times the Law expoun
one word in the sense of another, as 10 *E.* 31. 14
8. 2. 21 *E.* 3. 49. Reverter for Remainder, So it ta
eth a word spoken by one for the word spoken by
nother, & namely by Indendure; so here althou
it were not a Rent, but a sum in gross, yet it e
tends to it, and is to issue out of the Land: For t
Law saith so because it is specially alleadged t
ground of payment of the sum to be for the Land
and yearly to be paid, and the one is executory
the other; For if Land recovered by an elder tit
shall not pay, which hath not the thing whi
ought to pay, as 15 *E.* 4. 4. if he may not have t
ancient Pale, he is excused to make a new, so 9
4. 10. if he will not give counsell, the other sh
stay the Annuity, and 29 Assise 23. Rent for equ
lity of partition, charges, the Land parted thou
not mentioned, because the Rent was granted a
executory for the Land. So 2 *H.* 7. 5. it shall di
cend to the heirs of the grantee without naming
because it cometh in respect of the Land, whi
should discend to the heir, and when the ground
the matter appeareth, the Law supplies th
fault of the words, because the Law respects th
ground of the matter and consideration.

Gawdy. It is not a rent, in 35 *H.* 6. 33. all t
words shall be taken the words of one party,

viz. The first in the Indenture wherefore they are not the words of both, because it estops not the other party, and an estopple discends upon the Heir of him which is Heir at the Common Law, because he is Son by the half venter, neither Sister, or Brother by the entire blood; and although they agree to have the same, yet how, *viz.* as a rent or not, is not parcel of their agreement. So it shall not be construed a rent, because words may have a reasonable construction; otherwise in 22 *E.* 4. in the case of the Prior of *Bingham*, the Covenant was of a rent which shall be intended rent service, the Fine saith not *prædictum redditum*, but was of five acres and was for the land, and the Grantor was Tenant, so holden there to be an annuity, so here. 136.

Morgan, it is a rent, *f.* 137. *b.* for the assent of the parties is the chief matter to be considered, and not who speaks; for the Lessor shall not have debt for the rent reserved, unless it be a Contract; and it is not a Contract without the assent of all; and the words comming out of the mouth of one shal be the words of all in the operation of the Law. 137.

Catline. To the same purpose, because words equivalent to a Reservation; for the Law takes words of substance, and not usual equivalent, and words of substance is usuall, and the Law regards the effect and substance more than form; the words and substance will supply the form, rather then the intent of the parties shall be void: as Lessor and Lessee for life makes a Feoffment, it shall be the Feoffment of the Lessee, and confirmation of the Lessor, yet no word of Confirmation.

And so if a Tenant for years, and the Lessor make a Feoffment in Fee, this shall be taken the Livery and Feoffment of the Lessor, and surrender of the Lessee: and yet there is not any word of surrender of the Lessee, but shall be so taken by the judgment of Law. *See* ante *fol.* 59.

So a rent granted by Tenants in common, is severall, because the estates are several: yet words are Joynt (*Perkins* fol. 22.) *sic renuntiavit communiam*, 2 H. 6. 35. it is a release, because vide post. 161. 171.

where

141. where words are equivalent in ſubſtance, the L
will appoint how they ſhall enure, and in Contra
it is not materiall who ſpeaks the words, if the oth
agree; for the Law reſpects it, and the words, whi
prove the aſſent and have ſubſtance ſufficient.

And therefore 21 H. 6. if the wordes of the Ob
ligee make a Condition, *viz.* the Obligee *vult*
concedit, if the Obligor *fieterit arbitrio*, yet uſual
they are the words of the Obligor for Conditio

Brooks *abridg.* *Brooks cond. fol.* 58. abridge this contrary.

So an annuity *pro conſilio*, or a rent for Compoſi
tion Tythes. 6. E. 4. 16. enure as words Conditionall
and a Covenant that the Farmor ſhall not be im
peached for waſte, amounts (21 H. 6. 47) to ho
without impeachment of waſt, 17 E. 3. 9. if a Gua
dian aſſigns land of greater value then the Dow
to the Widow, and the ſecond Husband, who
granted a rent by the ſame Deed to him, with
ſtreſſe for the overplus, and the Deed recites thi
the Wife Leſſee after the death of her Husband
ſhall be bound thereby becauſe the grant to pay th
Rent of the overplus of the land, was made at th
ſame time that her Dower was aſſigned, which is
good reſervation; for otherwiſe ſhe ſhall not b
bound if the grant before were for reaſonabl
Dower, and no mention made that the land w
more worth then the Dower, becauſe it is witho
conſideration there, and is a Collateral thing; a
this difference between the words that enure up
on Acts between the parties concerning the prin
pal matter, and Collateral nature, ſo here th
ſumm is certainly recited, and the rent ſhall be th
ſumm (for the ſentence ſtands good, without words
rent, or farm) where thoſe words ſhall be adjudge
void, rather then the certainty expreſſed to be voi
as 4 E. 4. 29. I. is obliged to B. *Solvendum* to I.
good

ol, and the Count shall be to be paid to B. for the
ent of the parties makes this good.

So a Grant of Remainder by the name of Rever-
n of the land is a good Grant, notwithstanding
e mis-terming of the thing, because the certain-
of the land appeareth; but by a Grant of all Re-
sions, a Remainder doth not passe, because the
nt is in generalty, and so certainty by special
rms, and by general, differs. So where he saith,
ll rents shall be arear, and where the said rent of
l. 3. s. 4. d. in certain.

So words containing generalty, and incertain-
, and specialty, and incertainty, differ; to pay
s. at *Michaelmas* 1599, and at the same Feast of
Michalemas next ensuing other 10 s. there the
mm is taken the like, for that it cannot be the
ne if it come after; so one word taken for another 142.
pplies the intent of the parties.

That the Covenant and Grant for not payment,
at the Lease shall be void, is not a Condition by
nsey, *fol.* 133. because it is not spoken by him
ich gives the estate; as if two Joynt-Tenants
ake a Lease upon Condition, and that then one
ffee enters, he shal not enter but into one moyetie,
that he gave no more; and the words of one,
cause the Law saith, he speaketh only for his moy-
, shall not make this Condition to another which
aks not. And also the Condition is subsequent in
ne of the *Statute*, which was executed before, for
e Demise and *habendum* maketh the Lease (con-
ry by *Stanford* and *Walsh.* fol. 135. (for that the
rties are so agreed by Indenture, and the one party
d the other assents; and therefore all one as if
e had reserved the Conditional payment, which is
lled Rent, and is a Condition annexed, for to a-
id the Estate, *Litl.* fol. 70.

So

So here, because the ſumm certainly named, it a Rent, or ſumm in groſs; for it is not requi that the Leſſor ſhould ſpeak; but if the words the Indenture had intendment to avoid the *eſta* it ſufficeth, and the words ſhall be taken agreem of every party, and not ſpoken by one party m then another, as proviſoes are, or *ſi continu* and all the words of a Deed ſhall take effect at inſtant; becauſe the delivery is at one inſtant; it hath not ſeveral times proved, by 10 *Aſſ.* where ſeveral Deeds delivered at one and the ſa time, the one being a Leaſe for years, the other Charter upon Condition to have Fee, if diſti bed.

So 9 *H.* 6. 35. Leaſe without impeachment Waſte, provided, That he makes not volunt waſte in houſes is Conditional; and waſte li becauſe all made by one Deed; if by two Co nants, yet it is not ſpoken by the Leſſor, more th the Leſſee, but ſhall be taken as an agreement both the parties.

Gawdie, Juſtice, to the contrary, *fol.* 137. D feaſance of a thing Executory, as an Obligation Recogniſance, or Warratty, 43 *Aſſ.* fol. 44. g of a thing executed, not. As 43 *E.* 3. Defeaſan of a releaſe, unleſſe delivered at one inſtant; n of a Leaſe executed, by *Morgan* it is conditional 142. *fol.* 138. For Covenant lyeth not here, becauſe th Covenant lyeth of a thing to come, and to be do by the perſon of ſome one, and not of a thing to executed in it ſelf; and therefore if the words ure not to the effect, to determine the firſt Leaſe here they ſhall be void, becauſe it may not enure another effect.

It is not a Condition by *Brooks*, becauſe it is restrictive and compulſarive, as are *Ita quod non*

e Leſſee doth ſuch an Act, or if it happens, or pro-
ſo; but a proviſo alwaies maketh not a Condition,
in *Dockwraies* caſe, 27 *H.* 8. 15. becauſe volun-
ry; for Leſſee without words compulſary of the
eſſor, Covenants and Grants, That he will remove,
c. by *Catlin*, fol. 142. is a condition, becauſe it
plies the intent of the parties to be Conditional,
t it hath not the uſual words as a Feoffment, to
y 10 s. or inſtruct his Son in ſuch an Art.

For it is a Condition, becauſe the parties purport
ch intent. So proviſo, That the Leſſee make ſuch
thing.

So here, it ſhall enure as a Condition, in whatſo-
er manner it be called, it ſhall enure as a Deter-
ination of the Leſſee, becauſe it was made at the
me when the Leaſe began.

If the ſecond Leaſe, admit it be a Condition,
all be good before re-entry, or not. *Ramſey*, fol.
3. It is not good, becauſe after the Condition
oken, untill he enters, he hath but a Title, be-
uſe he may not grant, and the Leaſe continues,
d the poſſeſſion alſo.

And therefore 22 *E.* 4. 37. Leſſor ſhall not have
reſpaſſe untill entry, 14. 3. Aſſ. 11. Diſtreſſe
oth eſtop his entry, becauſe it affirms the continu-
nce of his Term.

Where a man may enter, he ought to enter, or
t have the thing; and where he cannot enter,
e ought to make claim before he ſhall have it. As
Reverſion granted upon Condition which is bro-
en, the Rent is extinct without Claim, for that
e may not have it but by Claim; by *Stamford* and
alſh it is good, *fol.* 136. for that the firſt Leaſe for
ears commenced by words without entry, it may
e determined by words without entry; Leaſe for
life not, 2 *Mar*, fol. 142. becauſe Livery and Sei-
ſen,

ſen, which gave the *State* and *Entry*, which
to be avoided by entry upon Condition broken,
it is expreſſed here how the Leaſe ſhall be avoi
viz. by entry; and then if he enters not, or
an Act which excludes him to Enter, as the ma
of an acquittance or diſtraining, there the Le
is good; But the words here are (utterly extin
diſſolving the Leaſe without Entry and no Act
ter ſhall make it good; and any words of entry h
are ſurpluſage, and take away the effect of the
words.

As to 22 *E.* 4. The Leſſor cannot puniſh hi
becauſe the entry was firſt with his aſſent;
when the Leaſe ended, he was Tenant at ſuff
ance; but he may make a Leaſe to another, an
determines his will; by *Gawdy* it is not go
Void here, ſhall be expounded void by Entry,
W. 2. *cap.* 1. before *fol.* 82. *Finis ipſo jure ſit nul*
viz. to the right; yet it is a diſcontinuance. S
8 *H.* 6. *cap.* 10. Outlary ſhall be void in Indi
ment, or Appeal, if no *Capias* in the County wh
he dwelleth.

Common Law, 19 *H.* 6. 2. expounds it ſhall
void by Writ of Error; he that hath a poſſeſſion
Law, may Leaſe before entry, after a ſtran
hath abated, but not ſo becauſe another hath p
ſeſſion in Deed.

So a Leaſe by the Husband for years, ſhall
be void of the Wives land after his death before
try of the Wife; for poſſeſſion ought to be def
ſed by poſſeſſion, and poſſeſſion ought to be gai
by entry.

Catlin, fol. 142. *b.* By the not payment, t
firſt Leaſe is determined without entry, becauſe
may be made by word without other circumſtanc
(otherwiſe of Free-hold) and therefore one m
m

ake a Leaſe, but cannot have Treſpaſſe without
ntry, as an Heir he may make a Leaſe before
ntry, but cannot have Treſpaſſe before entry, 11.
. 7. 22.

So a Leſſee may grant his Term before it com-
ence, 22 *E.* 4 37. yet he ſhall not have Treſpaſs
efore entry, 37 *H.* 6. 18. To ſhew two matters
here both are effectual, and anſwerable, makes a
ouble plea, as 3 *H.* 6. 32. Feoffment upon Con-
tion to infeoff the Heir, and averment of the Col-
ſion in Wardſhip of the body.

So 20 *H.* 6. 7. Seiſen in his Anceſtor and him-
lf, by avowing.

So 22 *H.* 6. 37. Two continuall claims, *viz.* of
the predeceſſor, and the Plaintiff, for to avoid a
ſcent.

So 19 *E.* 4. 4. by *Vaviſor*, and *Brain*. Two di-
ents in Fee bars not, or two diſcents are not
uble in Tail, becauſe one anſwer (*viz.* he gave
t) makes an end of all, for if he cannot ſhew one
ing without the other, it is not double, nor if the
e is purſuant to the other, as to plead (fully admi-
ſtred) and ſo nothing in his hands, for the laſt is
t a concluſion of the former. But the other Ju-
ces, held the aforeſaid two exceptions effectual
the cauſes aforeſaid, and that the Rejoynder was
cious; wherefore they ſaid, That it was in vain
argue them, and therefore in conſideration of
em onely, without reſpect to the other matters
ing upon the Rejoynder, and before debate, they
arded for the Plaintiff.

Throgmorton

Throgmorton *against* Tracie.

M. Mar. *In the Common Pleas Second deliverance.*

A Man makes a Leaſe for life, and after gr[ants] the Reverſion of the Land *habendum*, the l[eaſe] at *Michaelmas* after the determination of the f[irſt] Leaſe for life for one and twenty years, and [it] judged a good Leaſe for years of the Reverſion, [and] of the Land Reverting, and that the *Habend[um]* ſtood well with the premiſes, becauſe that the l[eaſe] which is the degree, and ſtate of the Grantor was [not] cluded in the premiſes, by the word [Reverſion,] [but] the degree and eſtate excluded by the *Habendum* and the other part onely granted, *viz.* The l[eaſe] Reverting, and ſo was the intent of both [the] parties.

151. Reverſion is compounded of the remnant of [the] eſtate which is left in the Leſſor, and of the l[eaſe] Reverting, and carries with him the land to be [af]terwards happening in poſſeſſion, and the land [is] the ſubſtance of both, and by the grant of this, b[oth] paſſe.

152. So the Mannor which is compounded of Demeſ[nes] nes and Services, and theſe words *ſtagnum aquæ* [et] *caria*, 4 *E.* 3. or *gurgite*, which conſiſts of water [and] land. The *Habendum*, which is not purſuant to [the] premiſes, is void; as a grant of a Mannor *Hab[endum]*, a Rent parcell of the Mannor, the word (Ma[n]nor) contained the rent, which the *habendum* [ex]preſſes, that the *habendum* is not purſuant to the [pre]miſes, becauſe in the grant it was Rent ſervice, [but] in the *Habendum* it is Rent-Seck.

So a Grant of Services, Homage, Fealty, [and] rent *Habendum*, the rent to the Grantee in Fee, [the] *habendum* is void, becauſe in the grant, the rent [was]

reserved as a rent Service, but here it is rent Seck: Grant of it after the death of *I. S.* void; for the nature of a Grant is, that the thing Granted ought to passe presently, for being a thing in possession, and granted as a Reversion there no Reversion was of it.

If one maketh a Lease of land for years, and after maketh a feoffment of the same; without livery it passeth not the Reversion by Attornment, (*Quære*) because the Grant of a thing which includes all interests in it, shall make the Reversion to pass; but the Reversion granted, shall not make the possession to passe. 38 *H. 6.* 34. The King Grants a Manor for life to which an Advowson is appendant, the Advowson passeth not; nor if he grant the Reversion *Habendum cum advocatione*, it passeth not, because in grosse, because it was not mentioned in the Grant, and nothing passes but what is mentioned in the grant, unlesse it be parcell or appendant thereto, and so the Advowson here was not included in this word (Reversion) and therefore shall not passe therewith, no more then a thing not mentioned in the premises shall passe in the *Habendum*. See post. 399.

The Office of the *Habendum*, is for to limit the estate; as if one grant a Rent by Deed, and it stay, there it shall be adjudged for life, but if the *Habendum* for a year, is for one year & no more, 7 *E.* 3. by *Trew*, 7 Ass. 1. *Perkins, fol.* 22. The *Habendum*, repugnant to the premises, void, and the estate before the *Habendum* shall stand, 14 *H.* 8. 13. by *Pollard*, *Perkins*, fol. 34. Contrary 13 *H.* 7. 23. by Fineux in a Grant to one and his Heirs *Habendum* for life.

So an *Habendum* to two, to the one of them for life, the Remainder to the other for life, this shall be void, because it severs the joyncture in the estate.

So a grant of two acres to two *Habendum* the acre to one, and the other to the other, this is void because it excludes the interest of every one in the acre. A Lease of Land reserving the profits, or two acres excepting one shall be void, because parcel of the thing granted, is with-held.

Doctor and Student, *fol.* 98. Reversion is a Tenement, and ought to vest presently as a Reversion, and not at a day to come; otherwise it is a Land Reverting without estate, and agreed of law by the Serjeants for the Defendant.

154. Every Deed shall be construed most strongly gainst the Grantor, and if it may be taken to effect, by any reasonable intendment, it shall and the intent of the parties shall be observed, here of using this word [Reversion] not in its proper signification; for then it first ought to vest, in Reversion presently by Attornment, and not at a day to come; but as a demonstration cert of the Land, *viz* all the land that they have in Reversion; and that they will not have the land pass in the degree of a Reversion, but in degree Demeasne.

And the Law will (That when the intent appeareth,) construe the words not apt of their proper and common signification to the intent, and a word shall have the sense of another, as *Lit.* 121. *Dedi & concessi* by the Disseisee shall enure a confirmation.

H. 17 E. 3. *fol.* 8. So 17 *E.* 3. 8. Manner shall passe by the name Fee *de Chivaler*.

So 10 *E.* 4. 4. 5 *H.* 7. 1. if one plead Demise words of licence to occupie, there one word includes in it severall senses, as here Reversion includes Land, the thing included passing by the word, 9 *E.* 2. *Piscary* passe *per aquam*, and 40 *E.* 3. 45.

...ry, and by *Turbary*. 7 E. 5. 342. So *Soil* ...ure, by *Gorst*, for 14 E. 3. Formedon lyeth ...gate.

So 6 E. 3. 183. By the name of one acre *Cornu-* ...*ſ*, for *Corniſh* acres contain ſo many, A man Grants his Remainder of one acre, to have and to old, the ſame Reverſion of that acre, good; be-auſe the Law reſpects the intent of the matter, nd applies the words to it.

So a Gift in Tail, reſerving the firſt three years a roſe, and after 10. s. good, becauſe one rent in ubſtance. 155.

A man ſeiſed of two acres, Leaſes one for years, nd after maketh a Feoffment of both, and maketh livery in this wherein he hath poſſeſſion by Attorn-ent, the Reverſion of the other paſſeth, 7 E. 4. 20. a 30 E. 1. if one paſs the third part of a Mil to one, & M. 7. E. 4. fterwards gives to a Stranger *totum Molendinũ ſuũ* he Reverſion of the third of the Mill which was in ower doth paſs, but Tenant for life ought to Attorn pon the Grant, *Brook* grants f. 30 the *Habendum*, ex-lains and corrects the words of the premiſſes, as ere the words [Reverſion of the land] to the land ſelf, being the ſame ſubſtance.

So 7 E. 3. 308. A Rent Granted out of a Mannor, to ue off one acre of the ſame Mannor, nothing ſhall e charged but this acre, in performance of the in-ent of the parties, by the Serjeants for the Plaintiff.

Anthony Brown, Serjeant for the Plaintiff. Te-ement compriſeth a Reverſion, as 33 E. 3. the ing licences to purchaſe Tenements in *Mortmain*, purchaſes a Reverſion, good. *Pl. 26*, grants 402. & alienation *fol. 55*. yet the word [Tenement] ere, agrees not with the premiſſes, for two cauſes. Firſt, becauſe that in the mean time after the Leaſe finiſhed at *Michaelmas* the land is in

possession, and then it is not a Reversion, being no particular estate; and therefore may not vest a reversion, as 21 *H.* 7. 11. Remainder may not vest but during the particular estate, and not at the ending of the first estate upon Condition broken.

See ante. fol. 25.

So 10 *E.* 3. dower of a rent reserved upon an estate Tail, good, so long as the estate continues, otherwise it is if the Tail be altered in Tail after possibility, or Tenancy by the Courtesie, for that the inheritance is determined, and the rent is now in another degree, 12 *E.* 3. and 10 *H.* 7. 13. by *Keeble*, if a rent be granted with a cessing during the nonage of the Heir, the Wife shall have Dower, and Execution shall be staid, otherwise, the Wife of the Son dying within age; for that during the Cessing she had not possession.

156.

Secondly, because the Reversion cannot be granted at a day to come, for then he shall have the particular estate in the mean time, and shall be Lessee to himself, and 38 *H.* 6. 38. a man cannot reserve the lesser estate, giving the greater, without alteration of the Lesser, as in 8 *H.* 7. 3. by *Vavisor*, before *fol.* 152. *A.* hath rent in Fee, and grants this to *I. S.* after the death of *I. S.* void, because the Fee passeth presently, if ever; and then he should have Franktenement of his own grant, untill *I. S.* dies. And the Estate shall not be so devided without alteration of the whole Estate; for a thing *in esse* cannot be granted to be *in esse*, one time, and to be in suspense at another: but a new rent may be granted to commence at a day to come; for there he shall not have the particular estate in the mean time, becomes not *in esse*, before Time material shall void the thing in all, *viz.* both the premisses and *Habendum* if it may not passe according to the limitation the

See post. fol. 197.

of, because the time is parcel of the parties intent, and if it may not passe as to the intent, all is void.

As a man hath a Rent or Term, and Grant it; if he stay there, good; if he saies besides *Habendum* after the death of *I. S.* all is void, So the Remainder void if the Termor enter without Livery, *Litl.* 12. But if the Term was to Commence at a day to come, the Remainder over, there it is void notwithstanding Livery, because there is no estate present to which the Livery may be annexed, so that the time of Commencement is materiall, and Livery before its Commencement is void; and Livery shall not destroy the time, but the time the Livery, and Grant, every act shall be taken strongest against the makers, and most beneficial to him to whom it is made, and he hath liberty in another sense to his advantage than the words purport *prima facie*; for every Deed shall be construed to some purpose, and not to be void, because it is made to some purpose, as 21. *H.* 6. 8. one may plead a Lease for years, and a release as a Feoffment.

See post. 250.

Litl. 12. Sect. 60.

So 7 *H.* 6. 7. and 22 *H.* 6. 42. The Feoffment of a Joynt-Tenant pleaded as a confirmation.

So. 9 *H.* 7. 2. The King by Parliament confirms the estate of the Patentee, *& dat & conceditur*, he may use it as a Grant or confirmation.

So in 21 *H.* 7. 23. Obligor may plead a Grant in Bar that the obligation shall not be sued before *M.* he may have a Covenant for it. 157

So here, the party uses this as a Demise of the Land, and not as a Grant of the Reversion; for the Reversion of the Land comprises the Land, as

Litl. fol. 106. a release of all the land to him [illegible] reversion, is good.

So 5 *H.* 5. 8. A Lease for years, and after a grant of the rent, this charges the reversion.

So *Litl.* fol. 158. recovery of the land against Tenant for life, will divest the reversion.

So 19 *E.* 4. 9. Writ of Covenant and the Concord, is of the land to passe the reversion.

So *Quid juris clamat* recites, That the land was granted before the reversion was.

So before *fol.* 149. Formedon shall say, *de una messuagio* where the Reversion was granted in Tail.

So a Reversion in Fee granted to a Termor, [illegible] hath the intire Term presently in Possession; so the reversion of the land comprises the land in substance; one word will passe the thing by another word, having the same sense, yet varying in name, because one same thing and intent of the party, as 2 *H.* 6. 4. before *fol.* 184. and afterwards *f.* 170. reverter for remainder.

So 3 *H.* 6. 6. if one makes a Testament, and commits Administration thereof, he shall by that word be an executer.

7 E. 3. So 20 *H.* 7. 11. by grant of the Church, advowson passes 14 *E.* 4. 2. by grant of the name of a Clerk a presentment passeth.

So before *fol.* 151. by *Stagnum molendinum*, the Soil passes, and so the thing contained in the premises though named in the *Habendum* by another name containing the same in substance, is good.

So a Grant of the nomination of an advowson *Habendum* the advowson, it is good. So of a Manor *Habendum* the services.

So mannor by Fine, *Habendum* one acre in Fee, shall have the acre in Fee, and the Manor [illegible]

ssue, because it wanteth limitation of the estate in the residue of the Mannor.

So a gift of a Mannor, *Habendum* the reversion in Fee of one acre, which is in Lease for life, good, Fee for the acre, and for life in the Mannor, because no estate is expressed in it.

So *Litl. fol.* 120. wherein one confirms the estate of Lessee for life *Habendum* the land in Fee, it is good, because in the estate land was contained.

So a Joynt-Tenant confirms to another *Habendum* the land to him and his Heirs, the Fee will passe; the *Habendum* may limit the estate to a stranger not named before in the premisses, as 13 *H.* 7. 17. a Devise to *I. Habendum* to him in Fee, after the death of the Wife of the Devisor not named before, hath an estate by implication of the intent of the party.

So 5 *E.* 3. 17. a man gives land *Habendum* in Franck marriage with a Daughter, it shall be a Joynt-estate.

So a Lease to *A. Habendum* to him for 20 years, the remainder to *B.* in Fee is good, because the intent of the parties was such, therefore *à fortiori* here the *Habendum* may explain the intent of the parties in the premisses.

Dier, Serjeant for the Plaintiff. A reversion is *Jus sive possessio revertendi & nomen verbale quasi terra reverters*, after the particular estate ended, proved by *W.* 2. of Advowsons of Churches, and prayer to recite the reversion, if he shall overlive the Tenant for life, and bringeth wast, good. 14 *E.* 2. *Fines* saith, *remanera* and not *revertera*, where a reversion was granted; Formedon in remainder lyeth, because the entire estate is not given, *Fitzh. nat. br.* 118. *D.* 10. *E.* 2. the Heir grants the other two parts with a third part in Dower *cum acciderit* there a 159.

reversion of Dower shall passe. 33 *H.8. cap.* [illegible] the not making of Leases in reversion is expounded That they shall not make Leases, beginning [illegible] the first ends, for that the words *ad firmam dimi[illegible] runt*, imply that the parties intend, that it shall [illegible] ure as a Lease of the Demeasne; for properly [illegible] man may not be Farmor of a reversion, nor have [illegible] *Ejectione firmæ* of a reversion.

No Attornment needs upon a Lease for years, be-
Bracton. cause it is a Contract, and *impetrationem oportet [illegible] benignam, ut res valeat*, as 3 *E.* 2. *Descendera[illegible] Remantra*, 6 *E* 2. *recipe pro re-entry.* So a gift to
3 *E.* 2. one for life *& post ejus decessum* to *I.* in Fee, good remainder for the manifest intent; an *Habendum* giveth an estate which was not given before; and to a stranger not named before, and alters the estate given in the premisses as a Confirmation to Husband
160. and Wife, or to Tenant for life, remainder in Fee to another good, *Litl.* 129.

So *Habendum* by moity, *Litl.* 66. makes Tenants in common, 8 *E.* 3. 427. by the better opinion, a gift to two *Habendum*, to one for life, and after his decease to another in Fee, the one shall have the entire for life onely, notwithstanding the Joynture in the premisses.

Otherwise *fol.* 153. if it be comprised within the Grant, it is good in the *Habendum*; as a Grant *[illegible] dispositione Ecclesiæ habendum advocationem*, so a grant of the Soil, *habendum* the Wood, and *de fundo domus habendum, domum*, so also *Manerium, habendum*, the advowson appendant, good: but a Grant of Common out of the land, *habendum* the land or herbage of a Park *habendum* the Park and such like are not good, because not comprised in the premisses.

Stamford,

Stamford, Justice; rules of Exposition. First, Deeds shall be taken most beneficially for the Grantee.

Secondly, they shall not be void, where the words may be applyed to any intent.

Thirdly, words shall be applyed, *viz.* expounded to the intent of the parties, and not otherwise. The intent directs gifts, rather then the words, as 41 *E.* 3. 16 *H.* 7. 10. by *Fineux*, Grantee of annuity *de consilio*, hath divers faculties, yet the Counsel shall be given in such a faculty, as was intended, *E.* 4. 22. one bound to pay *Recepta & recipienda*, shall not pay what he received not, but that which he hath received, because the intent is taken more forcibly then the words. 17 *E.* 3. 7. Lessee of a house, which may for his profit make houses there within, may not pull down, or make waste, for the intent was not so. H. 17. E. 3. 7. inactio de waste. 161

Sanders Justice; to the same intent with the Plaintiff. Exposition of Deeds shall be reasonable without wrong to the Granter: (as a Grant of Corody, Estovers, and Common for all Beasts, he shall not have it for Goats) and with the largest advantage to the Grantee; as a Disseisor releases all his right to the Termor, who shall have for his life, *Ass. fol.* 198. two Tenants in Common grant, 20. s. shall enure to several Grants, 34 *Ass. fol.* 11. one grants *totum piscariam salvo stagno molendini sui*; here the *piscaria* passes, for the *stagno* shall be excepted, and not the *piscaria*, because he hath a Reversion in the Propriety of the land, and possession the Ter-Tenancy. vide ante, fol. 120.

The nature of an *habendum*, is to give or inlarge or qualifie. *Malitiosa juris interpretatio hærere in verbis*, &c. the words are but witnesses to the contract, a reversion includes land by all.

Brown,

162. *Brown*, Justice. To the same intent of the A... and Covent, and of *Smith*, and his Wife who w... to have the land passe as a Lease after the parti... lar estate ended, and not otherwise; and from t... hour that their intent was to have the word Rev... sion enure that way, it seemed to him, That t... Law would warrant it, for the land is includ... the reversion; for if it was not, a man by grant... a reversion, could not have the Land in posse... after the particular estate ended.

And a Feoffment of a *Carue*, *habendum* the M... nor of *D.* is good, if the *Carue* maketh the Man... And if land is parcel of an Office, it shall pass... the grant of the office. Much more he said tend... to the effect to make the Lease good, and so... Plaintiff shall recover.

Brook, Chief Justice to the contrary. Estate... lands, includes land it self; land is a gene... word and contains grantor; and reversion p... cular words, containing a Decree where one cl... onely; intent shall be inclined, and ruled by... Law, and not otherwise; and intent never the... is shewn in certainty of words, as 9 *H.* 6. 35. *Re...*

vide ante. fol. 122. *ziavit communiam*, and not to whom is void, 3 *E...* Husband and Wife Tenants for life grant rever... of the Land that he holdeth by Homage, Feal... and Castle gard; the Lord grants all Services, C... stle gard passeth not, because he granted not... Castle. But in Testaments, the intent shall be o... ly observed, and rule the Law; because the Te... tor had not time by presumption to ordain all th... according to the Law. In conclusion he a... that Judgment should be given for the Plaintif...

Hill *against* Grange.

A Man maketh a Leaſe for years of a Meſſuage, and an hundred acres of land appertaining to &c. by Deed indented the 6. of *Auguſt*, reſerving rent yearly, payable at our Lady day, and *Michaelmas*, or 10 days after, with clauſe of re-entry, and after Grants the reverſion, and the Grantee the laſt inſtant of the 10. day after *Michaelmas* demands the rent, and enters for not payment, and it was adjudged that the entry was good, for theſe reaſons.

167. 3. Mar. *in Common Pleas in Treſpaſſe.*

1. Land may not appertain to a Meſſuage, becauſe both are things corporate ſimply; otherwiſe Advowſons, waies, &c. which are things incorporate; but things Corporate, or Incorporate, may pertain, or be parcel of a thing compounded; as a Mannor, Caſtle, Knights Fees, Honors, Forreſts, Monaſteries, Rectorie, *fol.* 170. *a.* But here the land paſſes as appurtenant, but by the intent and phraſe of the parties (as they have ſaid) uſually occupied or let, &c.

2. The rent ſhall be paid at the firſt Feaſt of *M.* or otherwiſe it cannot be annual, notwithſtanding that other feaſt be firſt named, 10 *E.* 3. the *Abbot* of *Stanys* caſe.

3. The demand of the rent the laſt inſtant, is good.

4. That the Grantee of a Common perſon is an Aſſignee to have benefit of a Condition, or Covenant, *fol.* 173. *a.* and ſhall not be intended of the Patentee of the King.

5. That the Patentee of the Heir and Succeſſors of

of *E.* 6. shall take benefit of the Condition by o
ty of the said *Stat.* and not by the words.

168. Things of distinct and several natures, the
is not parcel of, or appendant to the other, a
7. 1. by *Keeble* a Warren cannot be pertain
a *Leet*, nor a *Leet* to a *Hundred*, nor one O
another, nor land to other land; to a thing C
pounded they may, as a Mannor, Knight
Honor, Monastery, Castle, and a Village;
words general, as are Oxgang, a yard land,
of land, which contains land, Meadow, Pas
Wood, *&c.*

Messuage is a single word, consisting of a
special, and not Compound, nor a general w
for that 27 *H.* 6. 2. Land not parcel, or ap
dant to a house, and by demand of a Messua
præcipe, land shall not be recovered, and there
passe not by the Grant of a House, by the Serje
on the part of the Plaintiff.

23 *H.* 8. and 31 *H.* 3. by Feoffment of a M
age with the appurtenances; this word (L
passes not a Mannor, and things made appert
to it, are made by usage, and continuance. So
7. 28. land belonging to a Forrest, and Wa
of the Fleet, and the house of the Master o
Rolls, and divers farms to the Guardians o
Castle of *Colcester*, and one office to another; a
Custos brevium giveth one of the Offices of *prot*
taries, and use and continuance is cause of it.
man Leases a Messuage, and land rendring rent,
ought to demand the rent at the Messuage,
cause most worthy, *Perk.* 166. Meadow appe
to land. 3 *E.* 3. by the Serjeants on the pa
the Defendant.

Norw

Norwood *against* Read.

Action upon the case upon *assumsit* made by the Testator, lieth against the Executors, ad. 181.
ged. 5. Mar. in K. Bench.

For that the Testator could not gage his Law, herwise it is where he might gage his Law, for ignorance that the Law imputes of it to Execu- , and therefore there they ought to Demur; if they plead in Bar, which is found against m, they have lost the benefit of the Law, and Conusance of it, whereof otherwise, their ignce shall excuse them, 39 *H.* 6. 19. 12 *H.* 8. 11. *H.* 8. 23.

Woodward *against the Lord* Darcie.

If the Debtor make the Debtee his Executor, and 5. Mar.
leaves him assets to satisfie the debt, and dies, the Reso. *by the*
tee may pay himself by way of retainer, by the *Judges of*
, 12 *H.* 4. 21. according. *both Courts*

And in such case the Action is not utterly ex- by the Administration, for that the Law in- s that he is satisfied by retainder before; and so ing in Action, altered to a thing in possession Act in Law for satisfaction of the party, which no other remedy: but if he hath not sufficient for to satisfie the debt, the administration extinguishes not the Action, because that he retain for parcel, and have his Action against Heir for the residue, but ought to do the one or other at his peril.

Wrotesly

Tr. 1. El. *in Common Pleas.* Ej. firme.

A Leaſe for 80. years of a Farm, the Leſſor gran-ted the Reverſion of the Farm to a ſtranger, to have and to hold the Farm for 60. years after the end and expiration of the firſt Term of years; the Leſſor maketh a Leaſe for life to the firſt Leſſee for years during the firſt Term, and the ſecond Leſſee Enters, and upon an *Ouſter*, bringeth *Ejectione firmæ* and by the Court it well lyeth.

1. By the Law, by a grant of the reverſion of the Farm, the Farm, and all the Demeaſnes of paſſe, becauſe it is *nomen collectivum*, and certain of its ſelf; and ſo it was adjudged in the caſe of *Bridg* That by the Demiſe of the Farm, the reverſion and rent incident to it, paſſeth.

2. That the word [*Reverſion*] ſhall be intended land reverting in the premiſſes and the *habendum* and not the eſtate in reverter, which hath his continuance but in reſpect of the Term; and during it is a Grant of the reverſion, *Habendum* the Farm or land, or reverſion after the particular eſtate ended, which are all one.

3. That the ſecond Leaſe for years commenceth by any determination of the firſt Leaſe; whether it be in Law, or in Deed; and the expiration refers the Term, and not to the years; Term is an eſtate in or for years; and is finiſhed when the eſtate is finiſhed, and this may finiſh when the years remain.

If a man marry with a woman Termor, and the woman dies, her Husband ſhall have the Term for that the marriage hath not diveſted this eſtate the woman during coverture but by her death, the

to the husband by Act in Law, because it is a thing in possession, and not in Action. The Law is the Common use in Letters, Pleas; and Judgements, and the Common Law is but common use; by *Anthony Brown*, fol. 195.

Stradling *against* Morgan.

Exceptions alleadged in arrest of Judgment, upon not guilty pleaded by the Defendant, and found against him. 2. El. *Exchequer*, *debt.*

1. The Plaintiff hath shewed in his Declaration, that the Defendant was then receiver, *&c.* and doth not, That the Manners were the Queens then, and therefore shall be intended more strong against him, then it should be to a common person, and by consequence the Defendant is Baily to a common person; by the Court.

2. That no receiver or Baily accomptant of a common person, shall be within the *Statute* of 7 *E.* 6. c. 1. but onely of the Queen by the Court.

3. That the Action was not maintainable, and the matter well alleadged, lyeth in the Queens Courts at *Westminster*, notwithstanding the Statute of 31. and 35. *H.* 8. for *Wales*; for that they are in the Affirmative, and not in the Negative.

4. That by this *Statute* an Action of debt by Original Writ lieth for the forfeiture in the Exchequer, howbeit that the party hath not cause of privilege there.

5. The Plaintiff ought to make mention of the *Statute* of 38 *H.* 8. and 7 *E.* 6. in his count, for that the one is founded upon the other.

6. He ought to shew expresly in his Count, that the Queen was seized, and made him her Feoffee.

7. Feoffails

7. Iesuits remedies not mispleadings is adjudged in *Moon*, and *Cliffords* case.

In Debt the Plaintiff counts, That where was Bedel, and Collector of certain Mannor vertue of Letters Patents of *H.* 8. and had a Fee it, the Defendant being Receiver of the said M nor, in 3. and 4. *P.* and *M.* took extortion for payment of his Fee, *viz.* 4. *d.* for every pound, gainst the form of the *Statute* of 7 *E.* 6. the D fendant pleads not guilty, and found ag him.

And yet judgment given against the Plaint because the Count was incertain to whom he Receiver, and shall be intended against him, t done to a Common person, and a Receiver Common person, is not within 7 *E.* 6. yet wi the words; for the intent of the makers shall observed in the exposition of *Statutes*; and so general in words have been expounded to be particular, where the benefit hath been pa cular.

As the King shall not have Wardship of la which discends to the youngest Son, but of which discends to the heir general, 12 *E.* 4. S *ford*, fol. 8. yet the Tenant dyed seized of ot in Fee, because the *Statute* of *Prærogativa R* cap. 2. intends where the land is holden of the K but not where Lands holden of the King, and la holden of other tenure, descend to the l heire.

And *Prærogativa Regis*. cap. 3. intends that Soccage *in capite* shall give to the K primer seisen of lands, holden of a Common p vide ante, fol. 109. yet the words are general *Stamford* Pteroga fol. 13.

Marlebr. cap. 4. intends, where Signiory and Tenancie are in the same County; and therefore the Lord may bring a Distress taken in one County to a Mannor in another County, of which the land is holden, 1 *H.* 6. 3. 30 *E.* 3. 6. So *Glouc.* cap. 1. giveth Dammages to the Disseisee against him which is found Tenant after the Disseisor, for that he is Tenant by his own agreement; and therefore the Disseisee shall not recover Dammages against him which agrees not to a Feoffment made to him and others by the Disseisor, yet he is Tenant, but not Tenant by his agreement; *Litl. Remitter*, fol. 153. so *Long* 5 to *E.* 4. fol. 142. it he hath view in a precipe, and afterwards abates the Writ for false Latine, or for some other cause apparent, he shall again have another Writ, because there the Court might have abated this without motion. *See ante. fol.* 18.

For *W.* 2. cap. 49. although general, intends where the Tenant abates the Writ by exception, not apparent; and so by 25 *E.* 3. cap. 16. by non-tenure of parcel, no Writ abateable but for the quantity, intends if the thing demanded be several, as Acres; but all the Writ shall abate where the thing demanded is entire, as a Mannor, and the intent of the *Statute* never was contrary to the Text. 205. *vide ante, fol.* 109.

By *W.* 2. *cap.* 25. if one fail of a Record, he shall be a Disseisor; yet a woman Covert, shall not be, (11 *H.* 4. 50.) nor infant, because excepted by the Statute, yet in the words all are included. So Tenders shall not pay presently according to the words of *Action Burnel*, which ought to answer presently, *&c.* but shall be debtors presently with the duty, and chargeable with the payment and duties payable of the rent, or Revenues receive-

So by Expoſition it ſeems againſt the Text of the *Statute*, and is not, becauſe the intent of the makers guides them to it.

206. Of the part of the Defendant it was argued, That the Action ſhall be ſued there in *Wales*, where the receipt is alleadged, although that *Wales* is united to *England*, by 27 *H.* 8. becauſe by the ſame *Statute*, *Wales* is divided into 12. Counties, and by 34. and 35. *H.* 8. four Juſtices are appointed for *wales*, *viz.* one for every three Counties, and hold plea of all things within their circuit, and one ſeal appointed for every circuit, and all Actions ſuable there by the words of the *Statute*. And when the *Statute* appoints place, order, and form of ſuits, and before what perſon, it ſhall not be altered.

As by *W.* 2. cap. 11. an Accomptant found in Arrearages, ſhall be impriſoned in the next Goal, although it be in another County, 27 *H.* 8.

vide ante. *fol.* 17. So by *Weſtminſter* 2. cap. 3. Second deliverance ſhall be ſued out of the ſame Court, where the firſt Replevin was granted, and not elſewhere.

So 31 *E.* 3. c. 12. Error in the Exchequer ſhall be corrected before the Chancellor and Treaſurer, and therefore not before others.

So an Affirmative, becauſe general, implies a Negative excluſively; ſo all Actions ſhall be ſued in *Wales*, and not elſewhere, is implied here, as in *W.* 2. *cap.* 4. the demandant ſhall vouch in *Quod deforceat*, as if he were Tenant, and included, and not otherwiſe, and therefore he ſhall not vouch in *ſcire facias*, where it is the firſt Writ, becauſe he cannot vouch there.

vide ante. *fol.* 113. So the iſſue in Tail ſhall not be remitted, becauſe
207. he hath the uſe as a purchaſer, by 27 *H.* 8. for the *Statute* of 27. executes the poſſeſſion in the

manner as he had the use, which implies, and not in any other manner, So by 31 *H.* 8. Leases made by *Abbots* after this *Statute* adjudged void, when Abbies came after to the King by dissolution, because the *Statute* saith, That the King shall have it as it was then, which implies a Negative, and therefore the King shall not have them now in Reversion by making of such Leases, or before he hath them in possession.

vide ante fol. 114.

On the part of the Plaintiff it was argued to the contrary. And they agreed to the cases of voucher in a *Quod ei deforceat* of the Execution of the use, and of the committing of an accomptant to the next Goal; for where an Act maketh a new thing Affirmative, and gives to them Authority to do that which they could not before, there they shall be in the order limited by the *Statute*, and not otherwise; and at the Common Law there was not any voucher by the demandant, nor any coming to the land by the use, nor any power given to Auditors, to commit an Accomptant to prison; and therefore there, that which is limited by such *Stat.* ought to be pursued accordingly; but where the Action, which was before at the Common Law, is given by any *Statute* in any case where it did not lie before, there this Action is suable in all Courts, therefore used by the Common Law before, if there are not expres words to restrain it; for where one Act affirms a former before, there the last Affirmative destroies not the first, nor takes any thing from the Jurisdiction of the first, but declares That they have power.

So 34 and 35 H. 8. hereby the Affirmative takes not away the Jurisdiction of other Courts given to them, by 27 *H.* 8. for uniting *Wales* and *England.*

210. M. 3. and 4. Eliz. *in the* C. P. Quid juris clamat.

THe Conusee of a Fine, brings a *Quid juris clamat* against Husband and Wife, Tenants for life in the right of the Wife, and pleads that they were seized in Tail in the right of the Wife, and shews how, and thereupon are at issue; the Jury finds a private Verdict for the Defendant, and after in open Court contradicts it, and found for the Plaintiff; for they were charged openly in Court and ought to give their Verdict there openly; and the other was but matter of courtesie to ease the Jurors, and not of necessity; for the Plaintiff could not have been non-suited upon it; otherwise upon a verdict given in Court, and by this Plea, the estate for life was at the will of the Plaintiff.

A Verdict secretly given to the Justice out of Court, is not a Verdict, because taken of courtesie when Jurors agree for their ease, until aptly pronounced in Court; for at every verdict the Plaintiff is demandable, and then may be nonsuited; but there he is not, and therefore the last open Verdict shall stand.

Also the Inquest may change their Verdict given in Court if mistaken, or not plain in Law, or for other reasonable cause immediately perceived; as to find not guilty, and immediatly guilty, because they may be mistaken, this was received in the Kings Bench.

When Montague *was cheife Justice in* Archers *case.*

So 4 *H.* 4. 3. in Conspiracy, acquit one, and found another guilty, because it was contrary in itself, they may find both guilty, and good, *à fortiori* here than in this case.

Dutch

Dutchie *of* Lancaſter.

HENRY 8. makes a Leaſe for one and twenty years, under the great Seal of the *Dutchie*, and dyeth; after *E.* 6. being within age, maketh a new Leaſe to a ſtranger, under the ſame Seal for 21. years after the Determination, Surrender, *&c.* of the firſt Leaſe, and dies; and by all the Juſtices, Queen *Elizabeth* could not avoid this ſecond Leaſe for the nonage of the King, *E.* 6. howbeit he was ſeized of the *Dutchie* in his natural body; becauſe he hath the imbecillity of infancie; yet this is inveſted, and adorned with the dignity of the body politique of the King, which is utterly void of ſuch imperfections. 212. 4. Eliz. at. Serj. Inne.

A Leaſe by the King within age of *Dutchie* land, is good, although he was ſeized of the *Dutchie* in his natural body, which hath the imbecillity of infancy, becauſe he hath the natural body inveſted and adorned with the eſtate, and dignity Royal, by conjunction of the body politique to it, which is utterly void of ſuch imperfections; and ſo when both bodies remain in one perſon, all the bodies ſhall have the properties, qualities, and degrees of the body politique, which is the moſt worthy; and no Act of the King made as King, ſhall be defeaſable by any infirmability in his body naturall; and therefore the letters patents of the King within age, good. So a gift of the King by *Thorp*, 26. *aſſ. pl.* 54. So 6 *E.* 291. the King ſhall have right of ſeiſen of his anceſtor within age. So if the King have Lands by purchaſe, or diſcent, in capacity of his naturall body when he is King, or before that he was King, & being given by him to another while he is within age, it is

good; and shall passe by the Letters Pattents onely and without Livery, because he may not make Livery in his natural body, disjoined from the politicke body which are in one and the same body, and indivisible, and it is contrary to the dignity Royal, for a King to make livery in proper person; and Livery is matter in fact, and the King must have his Acts recorded. So the King need not demand rent reserved upon his land by a common ancestor; but shall not enter if the Condition be broken, until it be found by Office, if he purchases, and sels before he is King, and within age (if King also, then otherwise it is;) yet after he is King, he shall avoid it by his nonage before; but shall not enter without office because his person which had right of entry before, hath now the estate Royall united, which cannot do any thing without Record. And so Acts that the King doth touching things which he hath in his body naturall; require the same circumstances, and order, as things which he hath in his politique body by the union thereof, for the thing possessed changeth not from the person of the King, but the person; nor doth the possession change the cause of a thing possessed.

Rex habet corpus corporatum in corpore naturali, et è contra.

Henry the 4. which was Duke of *Lancaster*, held his Dutchie annexed to the Crown, as parcel of it by the assumption of the Crown; and because his Title to the Crown was defeasable, and because he would preserve the Dutchy to his Heirs if he should be removed from the Crown, he severed it from the Crown by a *Statute* made 1 *H.* 4. as it was before onely in course of inheritance of the Land and of the Government of it, *viz.* for the manner of Conveyance, as it was before in the hands of the Duke, as by Livery and Attornment but not severed from the Crown for the prerogatives of his per-

217.

son,

son, as 10 *H.* 4. 7 *H.* 4. the King had a *scire facias* against the Lord Le *Strange* with a *non omittas* for the Dutchie land. So 3 *H.* 6. *Rot.* 112. the Committee of a Ward hath aid before issue, and a *procedendo* with a Clause of not going to Judgment *Rege inconsulto*. So the person of the King for Dutchie land being taken to be higher then a Duke, because he shall not have aid untill after issue. But as he is Duke he is a Common person, yet shall make a Lease by the name of KING, because it drowns the name of DUKE in his Realm; and therefore Offices that were to be found how Tenants of Land in the Dutchie held, it was returned and found that they of the King *ut de Ducatu*, not *ut Duce Lancastriæ*. And by 3 *H.* 3. all Charters of the Dutchie land shall be sealed with the Dutchy Seal, or should be void, to the end that all possessions of it should be distinct used and known from the possessions of the Crown, for the policie aforesaid, because he was the Lineal heir to the Dutchie; and as the Dutchie was in the hands of *H.* 4. so in like manner it was in *H.* 5. and *H.* 6. But *E.* 4. because he was lawfull inheritor to the Crown, annexed the *Dutchie* of *Lanchaster* to it, and made it to be forfeit to the Crown: and so he altered the course of inheritance of it out of the natural body, into the politick body of the King and his Successors, but not in the manner of Government, name, *&c.* but separates it from other possessions of the Crown, in conveyance of it by another Seal, and other means, viz. by Livery and Attornment, which are used for the possessions thereof, as 21 *E.* 4. 60. Land of the *Dutchie* in the County *Palatine*, passe by Pattent out of it by Livery, because there he hath it as Duke; and by the *Statute* of 1 *H.* 7. the *Dutchie* was severed from the Crown, and made inheritable to the

H. 10. H. 4. fol. 7.

218.

219.

220.

natural capacity of the King, as it was in *H.* 5. because *H.* 7. discended of the House of *Lancaster*; so is it in *E.* 6. the Queen made a Feoffment of the *Dutchie* Land forth of the County *Palatine*, to be holden *in Capite*, the Feoffee shall hold *in Capite* of the Crown, and not as of the *Dutchie*; for that the King is not Duke within his Realm, but may be
223. when he is out of the Realm.

Willion *against the Lord* Berkly.

227. 4 Eliz. *in* C. P. *in an* Ejectione firme.

A Fine was levied to two, and to the Heirs of one, with Grant and Render to the Conusor in Tail, the Remainder to King *Henry* the seventh, and to the Heirs Males of his body ingendred; remainder to the right Heirs of the Conusor; the Conusor dies without issue; and after *H.* 7. entred, and died seised; and *H.* 8. gave the land to the Queen his Wife, for her life, and died: *E.* 6. Granted the reversion to one, and his Heirs, and dyed without issue, the right Heir of the Conusor entered, and his entry adjudged lawfull.

So the King shall be in a worse condition then a common person; for a common person may bind the inheritance by a common Recovery suffered by him, otherwise of the King, by *W.* 2. cap. 1. after *fol.* 244. *a.*

228. 1. That the Writ of *Ejectione firmæ* that wanteth words, *bona & Cattalla ibidem inventa cepit & asportavit*, is good, if the truth of the matter be so, and process of *utlarie* lieth in this writ by the Common Law.

229. 2. The Entry of King *Henry* the seventh is lawfull without office; for that the Law casts the Freehold

upon him immediately; otherwise it is where he takes an estate by Office, as Ward, Perquisites of villains, *&c.* and the right Heir may enter without Office, or *Ouster le main*, by the same reason.

3. Where the parties agree upon the matter in deed, and conclude upon the matters in Law, therefore *Nil refert*, but the Court shall adjudge according to the Law. 230.

4. Recitall of one part of a generall *Statute* is good enough, otherwise it is of a particular *Statute*. 231.

5. Omission of the date or place of Letters Patents is not materiall in pleading, nor Averment. 232.

6. A feoffment pleaded without entry of the Feoffee, is good; because it is included in the livery. 233.

7. The fee vests by the guift before the *Statute W.* 2. and is made more perfect by the means of the issue.

8. The pleading that *H.* 7. had issue, and died without issue, is repugnant of his own shewing; otherwise it is where it cometh on the part of the defendant.

9. The pleading that one enterd untill that the Lessor entred upon him, and made the Lease (is not good there) without saying, that he ousted him, and made the Lease.

The King shall be bound by the *Statute* of *W.* 2. of gifts conditional, for that it is in preservation of an inheritance in benefit of the publick good, and restitution of the intent of the donor, and the exposition that the donee might alien after issue, before the *Statute* of Gifts conditional, hath been a common error.

As

234 As to the matter in Law it was ſaid by the Ser-
geants of Counſel with the defendant, that the ca-
pacity that the King hath in his naturall body after
that he is King, remains, and the State Royall con-
founds not this capacity, as 45. aſſ. pl. 6. Henry
Aſſi. Li. the third gave the Mannor to the Earl of *Cornwall*
45. Pl. 6. in tayle, who exchanged it by a Deed for another
Mannor, and died without iſſue, and warranty, and
aſſets diſcended upon *Edward* the firſt his heir, the
King ſhall be barred, and therefore the aſſignee of
the party to the exchange had reſtitution, out of the
hands of *E.* 3. who had ſeiſed it, and ſo this warranty
and aſſets which diſcended upon the naturall body
of the King, was a Bar to the Reverſion that he de-
manded in his body politicke; And as a King may
take as heir by diſcent in his naturall body, ſo may
he purchaſe. As 34 *H.* 6. 34. and by pleading that
that *H.* 6. was ſeized in fee of an Advowſon in groſs,
conveyed it from *H.* 5. to him who granted it to the
H. 34. *H.* 6. plaintiff, it ſhall be good, without ſhewing that it
fol. 34. was *in jure Coronæ* or how; and there if the King
hath Land, parcel of the Crown, and parcell by
purchaſe, and dies, having a Son and Daughter by
one venter, and a Son by another, who enters and
dies without iſſue, the Daughter ſhall have the
Land purchaſed, and the Son the other. So pur-
chaſed Lands by the King ſhall go to the naturall
vide, Poſt body. So 35 *H.* 6. 28. by *Moyle*, Land in Gavel-
247. kind given to the King and his Heirs, the eldeſt Son
being King, ſhall not have all, becauſe it veſts in
his naturall body, but perquiſites of a villaine the
King hath *jure Coronæ* (as 41 *E.* 3. 21.) if a Biſhop
who hath a villain in the right of his Church enters
he ſhall hold it in his body politick, which is in the
right of his Church; for a thing in reſpect, or by
reaſon of another, ſhall be in the ſame degree, and
right,

ir, as the principal was at the Common Law. hat an eſtate of inheritance, *viz.* Fee-ſimple, as by the Common Law before the *Statute*. Firſt bſolute when a gift was made to a man and his eirs. Secondly, conditional, when to him and the eirs of his body, for that herein lyes Formedon in everter at the Common Law, if the Donee dies ithout iſſue in Remainder; for a remainder could ot depend upon a Fee Conditional until this *Statute*, and before this *Statute* the Donee might alien fter iſſue had, ſo bar the iſſue, becauſe they conrued the having of iſſue to be a performance of the condition, which was implied in the words, and in he intent of the Donee, and after iſſue, to be as an bſolute Fee, becauſe he had ſuch heirs which were imited. But before the *Statute* though the Donee ad iſſue, he might alien, and the alienation good, hich was contrary to the will of the Donor, for hich the *Statute* was made, and then Fines were of reat regard; yet by this *Statute*, *ipſo jure ſit nullus*, *viz.*) as to the right iſſue, or Donors, the Kings 236
erogatives are great; yet the Common Law ſo dmeaſures them, that they take not away any of he inheritances of the ſubject; and therefore the King ſhall pay Toll, though not for things bought, yet Toll Traverſe he ſhall, becauſe it is for going over another Soil, becauſe it toucheth the inheritance to permit a way over his Soil, without paying any thing, 46 *E.* 3. 23 *H.* 3. 35 *H.* 6. 26. 28, 29. So in the waving a Demurrer, or iſſue; he may not change one iſſue into another Term, becauſe then it would be infinite, which ſhould be to the diſinheritance of another. 13 *E.* 4. 8. *Statutes* general made in preſervation of inheritances, or for the publick good, binds the King without naming, as *W.* 2. *c.* 5. of uſurpations; but by 35 *H.* 6. in a *quare impedit*,

if

if an infant upon whom the King uſurps, ha
purchaſe as well as diſcent; it was not jud
cleere, but that by nonage it might be avoyded.
Merton cap. 5. That ordains, that the Kings
ſhall not pay uſury, *viz.* That the Rent ſhall
be doubled during the Nonage of the Heir;
therefore in 35 *H.* 8. 60. by *Needham*, if the
gives land rendring Rent yearly at Eaſter, and
fail to pay at the day, That he ſhall double
Rent, the Grantee dies, his Heir within age,
ſhall not double the Rent againſt the King:
Merton cap. 9. That a man ſhall make his Atto
for to follow his ſuit to the King; if it be his Lo
or at the Court of another, he ſhall do it: So
Statute of 5 *H.* 5. of additions, *Long quinto*, E.
fol. 32. of one Law which belongeth to a comm
perſon, the King may not defend of Common rig
but that every one ſhall have advantage; but ev
ry general *Statute* ſhall not bind the King, witho
naming of him: As *Magna Charta*, cap 12. *Comm
nia placita*, &c. nor ſuch which have an intent one
between ſubjects, and to repreſſe diſorder betwe
them; but thoſe which concerne the ſafe guard
inheritance, or publick utility of the Realm are an
237. ther thing. So the *Statute* of gifts Conditional bin
the King, becauſe by Juſtice, and Act of Parliamen
the King hath ſubmitted his Will to the Donor.

The King, as *Walſh* ſaith, hath in him, Firſt, po
er to do: Secondly; Juſtice to enforce him to
it, this is as to others: Thirdly, Mercy to ſtay hi
from doing, this is of things touching himſelf;
And becauſe after this *Statute*, the King may
ſay that the eſtate is Fee-ſimple Conditional, as
was before the Act, the caſe of the Tenant in T
attainted of Treaſon, was alleadged in proof of it,
37 *H.* 8. 7. 7 *H.* 4. 32. which proves that the King
ſhall

be bound by the ſaid *Statute*: So by 26 *H.* 8. 13, becauſe it is ſome eſtate of inheritance; alſo the Tenant of the King in *Capite*, gives in Tail *Quondum de capitali domino*, the King ſhall not have Wardſhip of the iſſue in Tail, 4 *H.* 6. 19. becauſe it is not now Fee Conditional, as before the *Statute*, and therefore he is not immediate Tenant to the King; 4 *H.* 7. 16. The King may receive the ſervices of the Donor by his hands; 27 *H.* 8. 26. The King may take the Donor, or the Tenant in Tail, for his Tenant, before Licence, or after, but *fol.* 191. vide poſt, 238. ſuch choſen ſhall not go back. Alſo 8 *H.* 4. 9. Tenant in Tail of a Signiory, aliens it in *Mortmain*, for default the Signiory revolts to the King, the King ſeiſes the Land, after eſcheat whereof the iſſue in Tail may have the land by petition againſt the King, and therefore is not Fee Conditionall, as to the King, but binds the King, although in theſe caſes the King claims in the right of the Crown, yet here it is very remote from the prerogative, becauſe here it remains veſted in the natural body of H. 7.

For the Plaintiff it was ſaid, That the Prerogative of the natural body of the King, becauſe of the union of the politick, as the attainder of *H.* 7. diſcharged *ipſo facto* as ſoon as he came to the Crown, 1 *H.* 7. 4. So *R.* 3. being Feoffee to uſes, when he was King the uſe was gone; becauſe the King in his body politick may not be ſeiſed to the uſe of another and therefore it was enacted, 1 *R.* 3. *cap.* 5. *Raſtal*, Uſes 3. That the Land ſhould be in Fee to him, to whom the Uſe was, So 43 *E.* 3. 20. Franchiſes extinct by purchaſe of the King (yet remaine to him and his Heirs) of a Mannor to which they were appendant: So if the King in his T. 43 E. 3. *fol.* 20. 239. natural

natural body and another purchaſe, or if the p
chaſe is before that he is King, they are not Jo
Tenants, but Tenants in common; *Fitz na.br f.*
G. becauſe no body politick may hold in Joinc
So 44 *E.* 3 45. The King may diſtrain in all othe
lands for his arrearages, where he hath the ſignio
in his body politick, and by *Benlos*, no entry ſhall
upon the purchaſer in his natural body, before
was King or after, for Condition broken by hi
So 10 *H.* 4. 47. The King hath a *non omittas* in
ſcire facias, for Dutchie land, and good, *vide*
216. Exception in intendment of the Act here,
good as if it had been in words, and Uſe is
naming of the King, when he ſhall be
ſtrained.

The King is favored in all expoſitions, beca
it is intended that he will not aſſent to preju
himſelf; the liberty and intereſt that he hath at
Common Law, is not taken away by the *Statu*
240. if he is not named, 12 *H.*7.21. proves it, becauſe
the Common Law every Lord may diſtrain for
Services in every part of the Tenancie, 10 *H.*7.
and after *quia emptores terrar. W.* 3. *cap.* 2. the L
ſhall have *pro particula*, but not more; yet the K
after this *Statute* if his Tenant aliens part,
have all Services by the hands of the Feoffee, or
offor, *Fitzh. nat. br.* fol. 235. and *Weſtminſter* 2.
17. which gives the Wardſhip to the firſt Feoff
binds not the King, for he ſhall have it, albeit
held of him by poſteriority. And ſo *Preroga*
va Regis, *cap.* 2. affirms the Common Law in
point.

The *Statute de Religioſis* 7 *E.* 1. For *Mort*
binds not the King, nor *Marlebridge*, *cap.* 9.
Grants, That the elder percener onely ſhall do

it 3 yet *Fitzh. nat. br. fol.* 159. all shall do it to the ing. So the King may sue for debt in the Kings nch, contrary to *Magna Charta* cap. 12. But 1 H. cap. 5. binds the King, because he is inclined in e word [Indictment] expresse, which is onely the it of the King, the King gives in Tail without ex- ressing any service, he shall hold in *Capite*, 29 *H.* for the King shall seize for his Fine, if he aliens ithout licence, 22 *E.* 3. 58. *Ass.* fol. 15. and it is ot *in capite*, if he holds of the King, by reason of a everſion, or Mannor, and not of his person, *W.* 2. p. 3. gives receipt generally to him in Reversion; t 25 *E.* 3. 48. the King shall not be received up- n the default of his Tenant, because then the de- andant should count anew against the King, but e ought to sue to him by Petition, 14 *H.* 8. 3. by *ieux*, the King shall not abase himself to stand to e defence as Tenant in suit, as a Common person all.

weston, Justice. A gift in Tail before *W.* 2. im- lies a Condition in Law, *viz*: That it should re- ert to the Donor, if the Donee did die without ue; and if the words had been expressed in the ift, it had been surplusage, and therefore there it a condition in Law, and not in Deed; for a Con- ition in Deed may be broken during the estate gi- en, but a Condition in Law as this is, cannot; Con- itions in Law are two, the one finishes the estate, s a Lease *quam diu*, one shall be Abbot, or live ole when he is removed to be Abbot, or taketh Husband, there the estate finisheth; the other fi- isheth not the estate untill suit, or entry, as where he Lessee maketh waste, or aliens, or Tenant in ee doth Cess, or Disclaims, *W.* 2. restrains the ali- nation of the Donee now after issue had; if the Gift had been to Husband and Wife, and to the Heirs

Fitz. N. B. in le breif de exone- ratione sect. ad cur.

241.

Heirs of their bodies, ingendred, and the W
survived, that her second Husband, if he had
by her, should be Tenant by the courtesie; now
is restrained: where the estate of the Donee be
the *Statute*, was Fee-simple, now by the intent
the makers of the Act, the estate is diminished
made Fee-Tail, and the Fee-simple is in the don
and a reversion made of it; and now the Fee-si
ple may be given over in Remainder, and so
estate is divided.

The King hath two capacities, and cometh
some things meerly as King; as Treasure Trov
See after and Escheats by Treason and to some, not as Ki
as if Lands discends to him from any of his ancest
for some deeds are by Patents of the King, as De
and Chapter, Major, *&c.* and these can not p
chase in succession by the word [Heirs,] but o
ly by the name of Successors; but the body polit
Common Law is the King, who notwithstandi
may take hereby the one or the other; the Ki
See before purchases in his naturall body, yet shall not take
213. Livery, for it passes not by Livery, but by Recor
& his Grantee thereof shall hold of him by Knig
Service *in Capite*, & none may distrain for Signi
or Rents in it, nor have execution of it. And 7
243. 4. 17. The King may not be seised to anothers u
in respect of the Conjunction of the body Roya
to the body natural.

Prerogatives of the King, are by the Comm
Law, by Custom, and by *Statute*; by the Comm
Law, the Kings Grant is taken most favorably
him, otherwise it is of the Grant of a Common
son: As an Advowson passes not by Grant of a M
nor, without special words, 2 *R.* 3. 4. 8 *H.* 7.
41 *E.* 3. 4. and *Prerogativa Regis*, *cap.* 15. is
more then Common Law in this point: the K

Grant a thing in action, 2 *H.* 7. 8. and 32. an Obligee Utlawed, the King shall have the entire duty 8 *E.* 4. 24. and 19 *H.* 6. 47. the King made a Grantee of the next avoidance, or of all presentments which shall happen within 20. years, though a stranger presents to them all, yet the King shall have them, and present when he pleaseth; Discent taketh not away the right of entry of the King, 37 *H.* 6. 27. The King may enter after his villain, and alien when he pleaseth, *Litl. fol.* 90. The King Counts of two presentments, it is not double, 43 *E.* 3. 14. or 12. Matters of Bar the other ought to answer to them, and the King shall take issue upon which he pleaseth. 16 *H.* 7. 12. by the Court, the King may Traverse a Title, or maintain his Office if he will, 3 *H.* 7. 3. 13, 14. 4 *H.* 7. 13. The King may amend his Declaration the same Term, 13 *E.* 4. 8. The King may wave his Demurrer, and Traverse the Plea of the other, 4 *H.* 6. 2. The King shall have a *Non omittas* in his Writs, notwithstanding any Liberty. That one shall serve his process but his Ministers: the King shall not answer in value, without express words, notwithstanding his warranty. The King shall demand rent, 2 *H.* 7. 8. The King makes a Lease, rendring rent to a stranger, this reservation is good, and the stranger may distrain, or have debt when his terme is ended, 35 *H.* 6. 36. The King may distrain for a rent charge granted to him, as for Rent Service in all the Lands of him which ought to pay it. 13 *E.* 4. 6. The Title of the King concerneth, yet he is not party, the Court of Office shall adjudge for him, *Stamford, cap.* 29 *fol.* 96. *Fitzh. nat. br.* 38. 6 *H.* 7. 12. and 11 *H.* 4. 71. all which cases declare that the King by the Common Law hath preheminence and prerogative over all other persons, and that he is not bound so straitly

See after fol. 323.

See before fol. 49.

vide ante fol. 139.

vide, Post fol. 334.

by the Law as others are; and as the Common Law doth not bind him, no more is he bound by private customes: for the custom of *London* to retain a pledge, *cujuscunque fuerit* untill he pay, binds not the King, 35 *H.* 6. 35. so nonsale in Market overt, 35 *H.* 6. 28. and Doctor, and Student, 40. nor *Wreck*, *Waife*, nor *Stray*, binds not the King, 35 *H.* 6. 26, 27. A Custom, that all distresses taken within his Mannor shall be impounded there, binds not the King, 21 *E.* 3, 4. Nor is he bound by *Statute*, but they bind not the King where he is not named, yet he shall take advantage of them: As of the Statute of Waste, and that of 9 *R.* 2. c. 3. of Error and attaint by him in reversion upon a recovery against Tenant for life. And of *W.* 2. *c.* 7. *fol.* 140. If the King as Heir to his Mother, brings *asur cui in vita*, the Plea shall not be delayed by the Nonage of the Heir; the King not named, is not restrained by *Magna Charta* cap. 10. upon which the *Ne injuste vexes* is founded for to avoid incroachment, That if the King incroach more then he ought, he hath no other remedy than by Petition. The King bringeth a *Quare impedit* in the Common Pleas, and indeed good, notwithstanding *Magna Charta*, *quod communia placita*, &c. 31 *E.* 3. 18 *E.* 3. 22. Plenarty no Plea against the King, 43 *E.* 3. 14. *Non obstante W.* 2. cap. 5. 32. *H.* 8. cap. 2. Of Limitations binds not the King: The King may not suffer a Common Recovery for to Dock the Tail, as a common person may, because no precipe or Covenant lieth against him, 12 *H.* 7. 12. by Constable. So the King shall be in a worse condition then a subject, or common person to bar the issue.

244.

vide ante. *fol.* 240.

Anthony Brown, Justice. The name of King divers

...the Sir-name of the King, and includes it, and his proper name also: and this word of substance by it self, may not be omitted in purchases, Patents, or Writs. Land given to *Henry* the seventh, omitting King, giveth nothing to him, omitting his name of Baptism: So a gift by him, by these words in the Pattent, *Rex concessit*, That the name Politick of the King, includes his natural name; and when this name is conjoyned to his natural person, it altereth the quality and the degree of the person natural in the estimation of the Law: So if that he be within age, he shall be adjudged of full age, and his attainder trustrate when he is King, for the greater removes the imperfection of the Lesser. the body politick hath the prehemi- 245
nence of the natural body, as Land given to the *King* by the name of Baptism, and of *King* also; as to *Henry* the *King*, and to his Heirs, this shall go in succession as the Crown, and if he dieth without issue the Heir of the part of his Mother which hath the Crown, shall have the Land also; because this name [*King*] being the greater, shall have the greater prehemінence in the purchase, and shall draw the land with him: So that his brother of the half blood being *King*, shall have it; yet here the *King* shall take in such body, and in such estate and condition as the Donor limits, and not otherwise. So if a Gift had been made before the *Statute* to the *King*, and the Heirs of his body, he had taken Fee-conditional, as another Common person, That if he dies without issue, the Donor should enter without Office. And if the *King* before the *Statute* giveth to one, and his Heirs of his body, there the *King* shall not have the Reversion more then a Common person should have, and there his Donee might alien without issue, because the person of the *King* shall not

See ante 138.

rule the eſtate of the land; but on the contrary; for to make Remitter, right, and poſſeſſion ought to diſcend to one perſon, *ſimul* and *ſemel*, 19 H. 6. 59. 78. and 45. before the *Statute* after iſſue had, the Donee might do all acts of a full Fee, becauſe
246. then he had full Fee and inheritance, and not before; 5, 6, 7, and 8 *E.* 3. And the words in the *Statute*, *ad dona prius facta non extenditur*, intends not the Donees made by the Donors before the *Statute*, but of alienations made by the Donees before the *Statute*, and lawfully, and after iſſue, as a Leaſe for life, and releaſe of Tenant in Tail before the *Statute* was good, and barred the iſſue in Formedon after the *Statute*, becauſe it was not voidable, neither before, nor after the Act, if it was according to the power that the Common Law permitted to them. 44 *E.* 3. But the *Statute* extends as to Alienations after the *Statute* where the Gift was before. So as to the Alienation before the *Statute*, if it were not lawfull, as a woman Tenant in Tail, taketh Husband, having iſſue, they alien before the *Statute*, the iſſue ſhall have a Formedon after the *Statute*, that is a diſcontinuance to the Wife, becauſe Covert, and when ſhe dies, a right diſcends to the iſſue, but if they have aliened by Fine, it is good, and bars the iſſue becauſe there it is duly made, in reſpect that ſhe is examined, 4 *E.* 2. 12 *H.* 4. 7. before the *Statute* the *King* might not Alien before iſſue had, as a Common perſon might not, becauſe the King could not do wrong, and his Prerogative could not alter his eſtate, yet the perſon of the *King* might alter the courſe of the thing, as purchaſe of the *King* ſhall diſcend to the eldeſt daughter onely; but if
247. land diſcend to the *King*, and another, or Gavelkind to him and his brother, the *King* ſhall have but the Moity, but this Moity ſhall diſcend to his eldeſt

Son

Son onely, becauſe the quality of the perſon may alter the diſcent, not the eſtate, be it Fee, or Tail. So that the eſtate before the *Statute* was all one in the *King*, as in another and before iſſue had, the Donee could not alien, after iſſue he might; and this miſchief, and other Acts of the Donee, the Common Law permitted to Bar iſſues, and the Donor, until remedied by the *Statute*. So the Common Law permits other wrongs, as Leſſee to make waſte. So if one Joynt-Tenant takes all the profit of the land, the other is without remedy at the Common Law, Doctor and Student, *fol.* 32. So if the *King* kill a man: So diſinheriting of another, as here *poſt prolem*, is a wrong ſuffered by the Common Law, which otherwiſe the iſſue ſhould have had, and if the iſſue had not iſſue, then the *Donor*; before the *Statute* the *Donor* had not a Reverſion, yet the land reverted to him as land eſcheated to the Lord, neither had he a Reverſion after the *Statute* of *W.* 2. c. 1. Yet no word in the Act divides the *Statute*, but the Conſtruction of the *Statute ex conſequenti* divides the eſtate, for to execute the will of the Donor by the intent of the Act, which amounteth to ſo much, that the preciſe words and the *Statute* reſtrains the eſtate, and not the perſon of the Donee.

vide ante, *fol.* 134.

Doct. & Stud. *fol.* 32.

And the Prerogatives are in reſpect of the perſon of the *King*, and goes in his perſon, which the *King* by Prerogative without an other act cannot enlarge; but in taking of the eſtate is reſtrained with the eſtate, inſomuch that the act ſaith, *Dominus Rex reſpondens*, &c. It ſheweth that the *King* is named effectually, and ſo bound; and when he provides remedy for the miſchief, it is not to be preſumed that he intended to be at liberty to do the miſchief; every thing which is the intent of the donor, ſhall be

248.

within the *Statute* as plainly as if it had been ex-
249. preſſed *in terminis* as other eſtates Tail, which are
not mentioned in *W.* 2. *Litl. fol.* 5. Lands intailed
ſhall not be charged againſt the iſſue for the debt
of his Father to the King, by *Anthony Browne*, who
ſaid, That it was ſo adjudged in *William Browns*
caſe, which was his Father, (*Puttrel, fol.* 240
otherwiſe) which proves, that the *Statute* of *De-*
250. *nis Conditionalibus* binds the *King*.

Dier, Chief Juſtice. The King onely is a good
name of purchaſe, and is the higheſt name of honor,
and drowns all other names of honor, and is cer-
tain enough, but not ſo uſed without his name of
Baptiſm. And the name *King*, contains both bo-
dies natural and politick; and Heirs, implies Heirs
and Succeſſors, and the adding of Succeſſors is a new
deviſe. The Donor may limit in what capacity the
King ſhall take, and Tail may be to the King as well
as to a Common perſon. That *H.* 8. entailed the
Crown to him, and the Heirs of his body; the will
251. of the Donor is the effect of the *Statute* of *Weſt.* 2.
that every thing which is againſt his will, is reform-
ed by the Act, and every thing which is his will is
made Law by this Act; and therefore this Tail ſhall
not be forfeit for Felony, (*Litl.* 169.) neither ſhall it
be charged by the donee, (14 *H.* 8. 7.) by *Roo.* 5.
H. 6. 14.) nor alien, neither ſhall the ſecond Wife
be endowed, (46 *E.* 3. 24.) nor the ſecond Tenant
by the courteſie, (46 *E.* 3. 5.) and therefore to ex-
preſſe thoſe in the Act is ſuperfluous, becauſe in-
cluded in the proviſo *quod voluntas*, &c. And theſe
three Tailes mentioned there, *viz.* Special, Gene-
ral and Free Marriage, are but examples, and not
as containing all Tails, that his will is a law to li-
mit other Tails; Fee after iſſue at the Common
Law is Tail now, by the 11 *E.* 4. and 3. and is Fee
in

in the Donor by implication of the Act, because it restrains the Donee to do the Acts of Fee, or no Fee without his properties: And therefore it shall be intended, That the Act would not that the Donee should have Fee, because it would not make an Act of Fee; and it is no Tail, because the *Statute* is limited, Docked or cut off.

The King shall be bound by the *Statute* of *W.* 2. *de donis conditionalibus*, for that it is made in preservation of the inheritance, in benefit of the Common wealth, and in restitution of the observation of the intent and will of the giver; and in Restitutions the King hath no favor, but the party restored hath favor, as an Heir restored to a Mannor shall have the advowson without mentioning of it. So a Bishop to the Temporalties shall have *Knights Fees*, and Advowson although not mentioned, 5 *E.* 3. 238. 41 *E.* 3. 5. and *Brian*, *Townsend*, *Davers* and *Vavasor*, took this so, though that the King should have but an estate Tail, for that otherwise the Remainder over will be invailable; and the Exposition that the Donee might alien after issue before the *Statute* is *Commun is Error*. 252.

Dame Hales *against* Petit.

258

M. 4. & 5. El. *In the* C. P. *in Trespasse.*

LEase for years to the Husband and Wife, the Husband drowned himself, and so became a *Felo de se*, the Wife enters, an Office is found, the Q. shall have the whole Term adjudged.

1. The quality of the offence is murther, because that it was upon malice prepensed, otherwise of Homicide, also it was made *Nullo sciente*, *nullo præsente*.

2. It is an offence against nature, the Law of God and the *King*, for to kill his Subject, and deprive him of one of his mystical members, whereof he is the head, and by breaking of his peace, and for the ill example given to others.

3. He shall forfeit for this Felony, all Goods, Debts, Chattels real and personal which he had at the time of the Act done, which was the cause of his death, *viz.* the casting of himself into the water, and the forfeiture shall have relation to this act done in his life, and is an Attainder in Law to that purpose, but not to make Corruption of blood, forfeit Dower, or make Fee-simples escheat; by the Court.

4. Although the Wife be remitted to the Term by the survivor, yet this is defeated by the office, *ex post facto.*

5. Where the Bishop maketh a Lease for years, which is not confirmed in his life, it needs not to be averred, in respect it is onely voidable, otherwise of Lessee for life, for that it shall be void by his death.

6. The pleading that Sir *James Hales* was possessed of two Leases at the time of his death, and the Office found that he had two, without saying at the time of his death, sufficeth, *reddendo singula singulis.*

7. Lessee for years to commence at *Michaelmas*, brings Trespass before the Defendant gives colour by the Lease, this is not good; yet the Plaintiff shall not recover, because he had no Title.

Southcot and *Puttrel*, Serjeants for the Plaintiff. He that striketh another and wound him, and after this wound given, giveth his goods to another before the death entred, the gift shall be good.

So

So a Constable 11 *H.* 4. 12. which arrests him, permits him to escape before the death of the other, is not a Felon; the finding by the Coroner of his death in this case, countervails an attainder indicted, because after his death he cannot be attainted, and he himself is the cause he cannot. A Felon of himself cannot make a Testament, or Executor, nor forfeit any thing, but that which ought to come to his Executor: Instant is the end of one time, and the Commencement of another, in Instant is priority of time in consideration of Law; Husband and Wife Joynt-Tenants of a Lease for years, there is no Moitie between them, but every one of them hath the whole; and if the Husband charge the land, she after his death shall avoid it, because remitted to the Term, and in by title *Paramount* to the Grant, 7 *H.* 6. 1. So 18 *E.* 4. 5. Tenant in tail gives Trees growing, and dies before they are cut down, the Donee shall not cut them, because the issue and Wife are in by title *Paramount*, as *Southampton* held. So 14 *H.* 4. 32. and *Fitzh. nat. br.* fol. 143. The Lord shall take his Ward, which is an Apprentice out of the possession of his Master, for that his title to his body accrued in respect of his signiory, which is more ancient then the Apprenticeship, 49 *E.* 3. 3. the Kings Tenant in *London* Devises to his Wife for Life, and dies without Heirs, the devise is good, as it seems by the Book, and yet taketh not effect until after the death of the Devisor, and preferred before an Escheat to the King, yet both their titles comes at one Instant, but the title of the Wife adjudged the elder, because some part of it Commences in the life of the Devisor, although it taketh effect after his death; *à multo fortiori*, therefore the Plaintiff was stated wholly in the life of her Husband, and therefore her title shall be preferred

259.

M. 7. H. 6. fol. 1.

ferred before the Kings; as Obligee is a Felo de se the Survivor shall have the Obligation by the latter opinion, 8 *E.* 4. 4.

269. *Walsh*, *Chomley*, *Benlos*, and *Carus* for the Defendant. A Dead man cannot have property, for the Forfeiture shall have relation to the ill Act done in his Life when the goods were his; otherwise the Forfeiture shall be to the prejudice of others, which after his death ought to have the goods, and the law hath respect to the Commencement of the Act, as in 22 *E.* 3. and *Stamford* 19. One is Lunatick when he gives himself a mortal wound, he forfeits nothing, and it is not Felony if then he kils another although he becomes of *Sane memory* when he dies of the wound. So 33 Ass. 7. *Stamford* 10. One kils his Master one year after he departed from his Service upon malice conceived when he was his Servant, adjudged Treason; Felonies done by others may be punished in their life time, in person, Goods, Chattels, and Lands.

Vid. Ass. 33. Pl. 20.

A Felon of himself hath prevented the death, by Execution and forfeiture of his Land, which Land shall not Escheat without Attainder in Deed for favor of the Free-hold and inheritance, and the only means to make him forfeit that which he may forfeit, *viz.* his Goods and Chattels is by inquest which ought to be equivalent to the Judgment given in his life, because he took away the means of the Judgement which should have been given against him in his life, as he should have if he had killed another; and when Judgment by the Law cannot be given, the Law supplies it; otherwise as 3 E. 3. a Felon flies out of the Sanctuary, and will not render himself, but is killed, he forfeits his Goods and the King hath the year, day, and waste; and so an Inquest there shall be equivalent to the Judg-

ment,

because he himself is the cause that it cannot be given against him; by *Carus*. My horse strikes A. I sell him to another, *A.* dies, the horse shall be forfeit.

So the King shall have the Goods of a Villain which gives himself a mortal wound, though the Lord hath seised them after the wound, and before death of the Villain. So the Attainder of the Husband in his life, shall be a Forfeiture of the Term of his Wife. So this Act here; but if once a title 261.
be given to the King, *Nullum tempus occurit Regi*, as in 50 *E.* 3. the Husband Joynt-Lessor for years with the Wife, receives mony of one Attainted, 50 E. 3. *lib.* Ass. 1 Pl. 5.
which by the Attainder belongeth to the King, the Husband dies, the Wife her self holdeth it, this is found afterwards, whereupon it was adjudged that the King should have the Term in Execution for his mony, as he should have had in the life of her Husband if it had been found then, and now being found by office, it shall relate to the life of the Husband.

Curia, this is Murther here and not Homicide, because upon malice prepensed, and is an offience against nature, the Law of God, and King, to kill a Subject, and deprive him of one of his Mystical Members, as *Brooks* terms it, whereof he is the Head, and by the breaking of his peace, and for the ill example given to others; and therefore *Felo de se* Forfeits to the King all his Goods, Debts, and Chattels, 8 *E.* 2. 3 *E.* 3. 301. 362. 22 *E.* 3. *Stamford*, fol. 188. *I.* and *Stamford* Prerogatives, fol. 8 *H.* 4. 2. by *Tilleſly* and *ex conſequenti* cannot vide ante, fol. 259.
make Executors, nor have Administrators, neither shall the Bishop have them, because out of the Church is no cause of Forfeiture, 19 *H.* 6. 63. by *Fulbe*, 8 *E.* 4. 4. by *Needham*, and *Lill.* and 27 *H.* 8. 9.

8. 9. by *Montague*, and if he repents he is reco-
ed, and hath the rights of the Church before
death, yet he shall Forfeit those to the King for
offence.

But a *Felo de se* Forfeits not Lands, his Wife's
vide ante, Dower, nor Corrupts his blood, 3 E. 3. 22 E.
fol. 259. because those cannot be without attainder
Deed.

If *Appellee* in Battail is killed, he forfeits his land
by *Benlos*, and *Brown*, because this killing is equi-
262. valent to Judgement and Execution; but *Wi*
held the contrary without express attainder
Judgement for to favor the inheritance; and
Dier, because the three Writs of Escheat for attai-
der, are (Register the 16.) *pro quo suspensus est*, *e-
lagatus*, or *abjuravit*; if the Appellor vanquish
Appellee in battail, there his land shall Escheat, be-
cause there Judgement shall be given after that h
shall be hanged; the Husband adheres to the ene-
mies of the King in *Scotland* and dies there, 8 E. 3.
263. fol. 388. or is killed in levying War against the King
here he forfeits his Lands, the Dower of his Wife
and his blood is corrupted, for this is an attainder i
Law, 7 H. 4. 46. by *Markham* and *Stamford*, fol.
198. *a.* that which causeth the death, ought to be
said, Felониously done.

He that refuseth the trial of the Law, forfeits
Goods and Chattels; as 3 E. 3. 13 H. 4. 13. 4 H.
7. 18. *Stamford*, fol. 183. *C.* and he which flies for
Felony, *Stamford Prerogativæ*, fol. 46. *A.* and he
that challengeth without cause above; 35 40 E. 3.
42. 20 E. 4. 5. *Stamford*, fol. 185. he that taketh
Clergie if he be found guilty of Felonies, which re-
fuse the Judgment of Law, 14 E. 4. 17. he that stands
mute of malice, for those are the Acts of refusal of
the Law. And from the time of those which
per

of Record, the forfeiture shall have relation to the wound given against the party himself for the forfeiture against a stranger, not for to be Felony, because in the mean between the wound and death, he suffers himself voluntarily to escape; for if the escape should be Felony, then that escape had been Felony at the time of the escape, by *Brown. A.* and B. Joynte-Tenants for years, *A.* Grants to *C.* That if he paies 10. l. before *Michaelmas*, then he shall have his Term, yet he shall not have the Term, because the condition precedes the Grant, as 14 *H.* 8. 21. but if *A.* Grant or Lease it from *Michaelmas* next coming during the Term to *C.* there *C.* shall have it against the Survivor, for there the Title is granted in deed in the estate in his life. So here this Act in his life gives Title to the King, and the office by relation executes the title then, and the Survivor shall not have it from him, because once attached in him; as the Kings Villain and his Wife are Joynt-Tenants for years, the Villain dies, his Wife hath the Lease as Survivor, this being found by office, takes away the interest of the Wife, as the entry of the King should in the life of the Villain, and upon Cesser thereof, the Kings title once vested, is not taken away, because *Nullum tempus occurrit Regi*, *Dier*; by *Weston*, where titles of the King, and others concur in one instant, the King shall be preferred; as Land discends to a Villain, his Lord enters, and afterwards the Villaine is found to be an Ideot, the King shall have the Land, and laches of entry shall not prejudice the King; for the Lords title to his body is in regard of his Villenage, and the Kings title accrues in respect of his Ideoty. So this Husband be intituled to be Tenant by the Curtesie, and his Wife after this found Ideot, this may take away the title from the Husband for ever, for the

the Heir shall be in ward, therefore if the L... holden of the King, or else the heir shall ha... out of the Kings hands, if not holden of him be c... the Title of the King to the Free-hold of the L... by the custody of it during the life of the Wife, sha...
264. take away by relation of the Office the Title of t... Husband, which before the Office was found, w... vested in the Husband.

Fish *against* Brocker.

M. 4. & 5. El. *in the* K. *Bench* 1 *Error.*

TEnant in Tail Levies a Fine with Proclam... ons, whereof the one was recorded to be m... the seventh day of *June*, which day was Sunda... and dies; the issue brings Error, and Reverses... the Proclamations; but the Fine remains good... the Common Law, and shall be a Discontinua... adjudged; and this Proclamation could not... made as it is Recorded, because it is no day... Court, and the Fine and Proclamation are seve... Records; and might have been avoided by Pl...

Sir John Ratcliff's *Case.*

P. 6. El. *in the* C. *of Wards.*

IF an Infant be made Knight in the life of his f... cestor, and the Ancestor dies, he shall not be... Ward for his body, for by this degree he is ad... red to be able to do Knights Service, and the w... ship is due in respect of imbecillity to do it, he d... not pay the value of his marriage, but his land s... be in Ward by the *Statute* of *Magna Charta*, c. ... if he be made Knight being in a Ward or b... the same Law is, if he be made Knight when h... Ward, 2 E. 6. *Brook, Gard.* 42. and 72. at the...

Law an Infant made Knight, shall be out of Wardship for land and body.

Say *against* Smith *and* Fuller.

271. P. 6. El. in C. P. *Replevin.*

LEase for 10. years by indenture from *Michaelmas* last past, the Lessee Grants, That he will pay 1000. Tiles to the Lessor, or a summ in gross at the end of the Term; the Lessor grants, That if the Lessee pays the said 1000. Tiles at the end of every 10. years from thenceforth next ensuing, That then he shall have a perpetual Demise and Grant of the premisses from ten years to ten years continually, and consequently beyond the memory of man, and adjudged good, except onely for the first ten years, for the incertainty of the beginning, continuance and ending of the other ten years. For the second ten years begins not until the condition (which is precedent to it) be performed, for this cannot ever be performed; for all the ten years that ever shall be, precedes the payment, and the payment precedes the Lease, and so the Condition impossible. Also he cannot pay the same Tiles that he hath paid at first. Also the payment at a day after the Term ends, is good, because that the Lease Commences from *M.* and so *M.* day is not part of the Term.

272.

Every contract to make good a Lease for years, ought to have certainty of beginning, continuance, and ending of the Term, all which ought to be known at the beginning of the Lease, and if any of them fails, it is not a good Lease, because it wants certainty, by *Brown*, a Lease Conditional is good until the Condition broken, because the Estate precedes, and the Condition is subsequent. A condition

dition to have a Leaſe gains not the thing, unleſs it be performed, as the needle precedes the thread, as if one be to marry my Daughter in conſideration whereof I promiſe him 100. l. he ought to marry my Daughter firſt, otherwiſe he ſhall not have the 100. l. which I promiſed: So 7 *E.* 3. 308. if he will hold over eight years to him and his Heirs one ſhall pay twenty pounds yearly, Debt lyeth for the Leſſor for the Rent within eight years, becauſe the Leſſee hath but a Term, for the Condition precedes the Fee-ſimple, (by *Litl.* fol. 81.) Leſſee for five years upon Condition, That if he doth ſuch a thing within two years, he ſhall have Fee, but this is no law (by *Dier*,) becauſe he hath not Fee until the Act done.

vide ante, fol. 25.

273. Referrence to time certain, is as much as expreſs nomination of the time contained in the reference: as a Leaſe for ten years, and ſo from ten to ten during an hundred years, a good Leaſe for an hundred years, 29 *H.* 8. So I make a Leaſe as long as *I. S.* ſhall be impriſoned by the *Statute* of *W.* 1. cap. 20. this is good for two years, for ſo long by the *Statute* he ſhall be impriſoned. So I make a Leaſe for years rendring 5. l. yearly, and after I grant the Rent and Reverſion to B. untill he hath received of the Rent 20. l. it is all one as if I had granted the Reverſion for 4. years, becauſe he ſhall receive 20. l. in 4. years, and ſo the referrence contains ſuch certainty from the time of the Leaſe certainly limited; for the number of years may commence, or determine upon incertainty very well; as a Leaſe for 20. years after that the Leſſee ſhall do ſuch an Act good. So for 20. years, if the Coverture between *I. S.* and his Wife ſo long continue is good, So 4 *E.* 6. and 14 *H.* 8. 11. A Leaſe for ſo many years as *I. S.* ſhall name, and he names ſo many years in

vide ante, fol. 6. & 13.

life good for so many years, but if it be for so many years as my Executor shall name, there it is not good, because he cannot name in my life, and so it is not a Lease in my life, and the certainty ought to be known in my life. But a lease untill *I. S.* who hath Execution of a *Statute* Merchant untill he is satisfied thereof, it is no good Lease, because *Terminus* contains certainty, and there it is uncertain how long the Lease will endure: So a Lease for three years, and so from three years to three years during the life of *I. S.* is good for six years onely, because those onely certain, and the end of the number of years intended, ought to be known at the beginning.

So a Parson Leases for five years, and so from five years to five years during his life, is good for ten years onely; yet he continues Parson above ten years. *Dier* said, That he knew it Adjudged. 274.

Graisbrook *against* Fox.

A Man makes his Executor and dies, the Ordinary before *Probat* commits the Administration to one which sels the goods, the Executor proves his Will, and bringeth Detinue against the Buyer for the Goods, and adjudged lawfull. 275. P. 7. El. in C. P.

For that the *Probat* disproves, over-reaches, and annihilates the power of the Administrator, and he did not die intestate, and by consequence the property is cast by the Act of Law upon the Executor, and the Commission of the Goods of one that hath made his Testament before refusall void after probate by seising of the goods, bringing action, or

pleading, *&c.* without Suit in the Spiritual Court, but otherwise shall it be if the Administrator had imployed the money that he took for the Goods upon the necessary affairs of the Testator, which the Executor was chargeable to do.

277. *Weston*, Justice, holdeth the Law with the Defendant. That at the Common Law before *W.* 2. c. 19. the Ordinary had the goods of the intestate, to dispose in pious uses, because the Law adjudges him the most apt person for it; and if he give, or aliens his goods to pious uses, it is good at the Common Law, and if he doth it not, he hath broken the trust required of him; yet the Common Law maketh not the Ordinary, being a Spiritual Governour, subject to Temporal Suits of Creditors of the intestate, but was defective in this point, 11 *H* 7. 12. and 9 *E.* 4. 33. But now Debt lyeth against him, by *W.* 2. cap. 19. and those words there *Obligati aliquibus in debito*, &c: intends all Debts that the Executor is bound to pay, by which the Ordinary shall pay Arrearages of rent upon a Lease for years of an intestate; but before the *Statute* nor after, the Ordinary might not sue for Debt, or thing in action of the intestates, not release Debts due to the intestate, but onely seize the things in possession of the intestate and do with them at his will; and for this mischief 31 *E.* 3. cap. 11. compelled him to commit the Administration to the next friends, and gave to them
278. an Action of Debt, and not to the Ordinary himself and so they were, and might be sued, and should account as Executors, yet before 31 *E.* 3. the Ordinary might commit, and such Commitees should be sued before *E.* 3. by the equity of *West.* 2. which gave the Action against the Ordinary; but Commitees before *E.* 3. might not Levy a Debt, not release

Debt

Debt, because they had not to do with things in Action, (but in possession at their pleasure) as 7 *H.* 4. 18. Executor now cannot release a Debt, nor sue for a Debt before probate of the Will; and it seems to him, That the sale of an administrator is good, because no notice of the Testament is given to him, and the Ordinary, nor cannot be bound to take notice of it, because secret, as 8 *H.* 7. 10. 22 *H.* 6. 34. 7 *E.* 4. 28. and 8 *E.* 4. 12. and 19 *H.* 8. The Lord may avow upon his ancient Tenant if the Grantee gives him not notice of his purchase, because he is not bound to take notice. So 2 *H.* 4. 21. If he had paid the assets to another, hanging the writ against him before he had notice of the writ, is good plea for an Executor, and he shall not be charged therewith to the Plaintiff; 31 *E.* 3. provides, That the Ordinary shall commit Administration; where he dies intestate, intends also, where Executors refuse before the Ordinary, or if they die intestate, because there is no Executor that will intermed- 279.

Acts by the Administrator shall not be avoided by probate of the Testament, where the Ordinary had authority to commit Administration in the mean time, because there is no Executor, as where a man wills, That I. S. shall be his Executor, and dies before *I. S.* or that *I. S.* shall be Executor one year after his death. So 4 *H.* 7. 2. a man maketh an Executor, and enters into Religion, if he after is deraigned, he shall not answer any Acts of the Executor done in the meane

Walsh and *Dier* holdeth the Law with the Plaintiff. There are three which have to do with the Goods of the Dead, by *Walsh*, viz. First the Executor appointed by the Party himself in whom the

party hath reposed the properties of his Goods, and
confidence of the Executor of his will, and it take
Commencement by act Temporal, *viz.* by the will
and it's perfection by act Spiritual, *viz.* probat; b
if the party appoint none, then the ordinary shall
Secondly, the King appoints the Ordinary, and h
appoints the Administrators for his ease, and in t
discharge, and they have their Commencement b
Act Spiritual, *viz.* by Letters of Administration, a
have as the Executor hath, authority of the thi
Temporal; but the authority of the Ordinary,
of Administrators is not any, except the dead
intestate; and here by not gainsaying in his Ba
hath acknowledged the Testament; and by *Dier*
280. if he had died intestate, the property of his goo
cometh by the Common Law to the Ordinary, t
cause he had not appointed them to any, and th
shall be in some body, and not in suspence, as 9
7. 2. by course of the Common Law; Free-h
shall be in some one, and not in suspence: the O
dinary by the Common Law was not charged
the debt of the intestate before *W.* 2. for those w
Obligetur de cætero implies the same, after *W.*
Ordinary is chargeable, and his Executor, 16 E
11 E. 3. So after *West.* 2. and before 31 E. 3.
Ordinary might commit Administration (and
shall be charged in Action of Debt.) so *Fitzh. Sc*
nat. br. fol. 120. D. and 19 E. 3. Ordinary pl
That he had committed the Administration to a
ther before the action brought against him, i
good plea; but the power that the Ordinary h
self had, or committed to the Administrato
another, is not, unless a man dies intestate,
when he makes his will, by it he hath com
all his goods to his Executor, and the Law ta
Will; for Testaments are of the same antiqu

properties of Goods are, and is a Teſtament when the Teſtator is dead, and from thence executors, are executors, and before *Probate*; for it is not but a Confirmation and allowance of that which the Teſtator hath done. And by the Death, the property of the goods which were in the Teſtator, is caſt and veſted in the executors, whereby they may give, or otherwiſe intermeddle with them, and may be ſued before *probat*, 9 *E.* 4. 47. but ſhall not ſue, *vide ante*, and 36 *H.* 6. 7. Executor commands *A.* to take the *fol.* 178. Goods of the Teſtator out of the poſſeſſion of *B*; *A.* taketh them, afterwards the Executor refuſes the Adminiſtration, and the Ordinary commits it to B. which bringeth Treſpaſs; for the taking againſt *A.* *A.* may juſtifie by commandment of the Executor, for his refuſal ſhall not make the Commandement void, nor grieve him which did well at the time of the Act done; which caſe argues, That the Executor hath intereſt in things of the Teſtators before *probat*. And by him the Ordinary ought not to 281. offer the Executor to refuſe, after he hath once medled with the goods of the Teſtator; for if before the *probat* he had releaſed a Debt, and after he proves the Will, this hath made the releaſe good: *alſo*: *probat*, maketh the Releaſe of the Executor made before, good; becauſe it is a conſummation of the Will, and refers to the death.

Dier, Chief Juſtice. If the Ordinary commit, and after the Metropolitan commit to another, becauſe the inteſtate hath Goods of the value of 10. l. in divers Dioces, 10 *H.* 7. 18. this diſproves the Authority of the firſt Adminiſtrator, and avoids his own Acts, and by *Keeble*, the ſecond Adminiſtrator ſhall have Treſpaſs againſt the firſt, for taking the firſt Goods. So 7 *E.* 4. 12. Executor pleads that he hath proved the Teſtament, the action of

the Administrator depending against him, a good Bar, because the power of the Administrator disproved, and mean acts avoided by *Probat* of the Testament, and the Executor which is made, not knowing of it, if he agree after, it is good; And it seems by 3 *H.* 7. 14. The Ordinary ought to award Process against the Executor to come in for to prove the Testament, before he commits the Administration. The *Probat* here disproves the Administration however, and proves the Executor to be full Executor from the death of the Testator. The Seal of the Ordinary put to the administration is but matter in fact, and no estopple, and the executor shall not be inforced to sue in the spiritual Court to recall this but shall avoid it by Plea, or by matter in fact, as

M.3.H.7. *fol.* 14.

vide ante, *fol.* 239.

282.

T.44 E 3. *fol.* 16.

44 *E.* 3. 16. *A.* bringeth Debt against *B.* as Administrator, and sheweth this in certainty, *B.* saith, he and another are executors, Judgement of the Writ and shew forth the Testament to prove it; *A.* offers to aver that he died intestate, *B.* saith to it, he shall not be received contrary to the Testament proved, and under Seal, that so he might take the Plaintiff from his averment, but he shall have and try it by the Country; also the taking of Letters of Administration, discharges not a Suit against those which were Executors of their own wrong (before 21 *H.* 6 8. 2 *R.* 3. 20. So 34 *H.* 6 14.) in debt by the Administrator, the Defendant was received to avoid Letters of Administration, by saying the dead made an executor, and taking it sue upon it.

Chapman

Chapman *against* Dalton.

A Man makes a Leaſe for 21. years by Indenture, and Covenants with his Leſſee, and his Executors, to make a new Leaſe for 21. years after the expiration of the firſt, to the Leſſee and his Aſſignes; the Leſſee dies, and the Executor of the Executor brings Covenant after the firſt Leaſe determined againſt the Leſſor, and adjudged good. 284. Tr. 7. El. *in the* K. B. *Covenant.*

1. That the executor is an Aſſignee in Law, to whom the Leaſe ought to be made, and ſo the executor of an Executor by the Common Law.

2. That the Leaſe ought to be made to the Leſſee if he were alive, or to his Aſſignes in Deed, and he die Aſſignee in Deed, then to his Executor; and although that the Covenant be in the copulative in the Letter, yet it ſhall be expounded disjunctivie in ſenſe, for to avoid abſurdity or impoſſibility.

3. Admitting that the word Aſſignee were void, or omitted out of the Deed, yet this ſhall be made to the Executor; for that the intent was ſuch, which ſhall be performed where the words could not.

Baber and *Wray*, argued for the Defendant, as 286. 287. abridged by *Aſh*, *fol.* 50. *Fleetwood*, and another apprentice for the Plaintiff. Every Covenant and Grant ſhall be taken moſt ſtrong againſt the maker, and moſt available to the other. And if the words thereof have a double ſenſe, that which is for the benefit of the Grantee ſhall be taken; then the word [*Aſſigned*] here ſhall be drawn to the effectuall ſenſe for the avail of the Grantee.

And if the word [*Assignee*] as the Councel on the part of the Defendant would have it applied to a limitation, *viz.* in the sense of an *Habendum* to him and his Assignes for 21. years, it is void, and conveys no benefit to the Grantee, because if I Lease to A. for 21. years, his Assignes shall have this as largely as I do vest this Lease in him, and his Assignes, because the Law gives power to him to assign it to another.

1. Assignee hath two senses; in the one it signifies the person to whom the thing granted or given, shall be afterwards conveyed by him which hath the thing; as the Lessor Grants to the Lessee for years, That he or his Assignes shall have twenty Carts of Wood annually in such a Wood, Assignee there hath the sense of the person to whom he shall Assign the Lease.

So one warrants Land to the Feoffee, his Heirs and assignes, there the second Feoffee shall vouch. So I sell a Horse upon Condition, That if I pay 40. s. to him, or his Assignees, that I shall have the horse again, Assignee there is he to whom he grants the horse; but such Assignee is not in our case, because he hath not any estate first made, and such a one is Assignee after the thing granted.

2. In the second it contains the person to whom the thing which is to be made, and is not made, shall be made: as I am bound to make a Feoffment, or give a horse to you, or your Assignee, there the Assignee is such a person which you shall name to me to receive; and the Assignee in this sense is before the things done or granted, and Assignes in 288. this sense is in the first also.

But with this in the first sense, we have not to do here; there are Assignes in Deed, and Law; in Deed, where you name such a one, to whom I shall

make the Feoffment, or give the Horse; in Law where you name no man to receive, then the Executor shall have it, because the Law saith, That they are your Assignes to such purpose, and present your person, as to receive any Chattels real or personal.

So 27 *H.* 8. 2. Executor is an Assignee in Law to take a Rental, where the Lessee bound himself to deliver it to the Lessor, or his Assignes at the end of the Term. And therefore here [and] the Copulative shall be taken for [or] the Disjunctive: for otherwise the sense will be absurd, that the Lessee if he had been alive at the end of the first Lease, should not take a new Lease until he names his Assignee; or impossible, as joyning his assignee in law with him, because he cannot have an Executor in his life. 289.

So in our Law, a copulative is taken as a disjunctive, and a disjunctive as a copulative for to make words to stand with reason, and with the intent of the parties, as the Obligee shall pay 10 *l.* if he infeoff not him, or his Heirs, when he cometh to *I.* this intends (though the words be disjunctive) in sense, That he shall infeoff him if he be living, & if dead, then his Heirs; because he cannot have an Heir during his life; so here, a Covenant to make a Lease at a time to come to him and his Assignes Copulatively, shall be taken disjunctively, viz. to him if he be alive, and to his Assignes if he be dead.

So *A.* and *B.* Grants a Rent Charge of 20. s. out of all lands, which they both have, the Grantee shall have several, 20. s. out of both their lands, and yet the Grant was out of the lands which were of *A.* and *B.* 19 *H.* 6. 3. I release all actions which vide ante. *fol.* 171.

I have against *A.* and *B.* if he hath any actions against either of them, they are gone.

2 R. 3. *fol.* 18. So Arbitrators, 2 *R.* 3. 18. may make Arbitrement of actions joynt and several, where one and two others submit themselves to their arbitrement; because it literally couples them, yet in sense goes to them severally. And so in the Common case in Indenture of bargin and sale, which Covenants to make a sure estate, or deliver evidences to the Bargainee and his heirs within two moneths; and he dies before: he ought to make the estate to his Heirs, because it is impossible to be performed literally, *viz.* Joyntly; for in his life he cannot have Heirs; and that thing which another doth by my authority, is my act.

As if I demise, That *I. S.* shall sell my land, or authorize my Steward to demise it; or my Baily to sell my sheep, which doth it; so it is my alienation, demise, and sale by him. So the second Executor shall be immediate Executor, and in such degree to the first Testator as the first Executor was, as chosen by the first Executor by force of the Authority given to him by the first Testator, which intends the same; or otherwise all contracts would be destroyed by the Common Law in a short time, viz. after the death of the first executor; because administrators could not have actions given to the intestate, untill 31 *E.* 3. *cap.* 11. proved by 10 *E.* 3. 2. which gives power to the Executor of an Executor to bring severall actions because Executors have not those actions by the Common Law, but by *Statute*; and because by equity they were not to be extended to an Executor of an Executor; but the action of Debt was put in the Act in 25 *E.* 3. cap. 5. not of necessity, because the Law gave it to an executor of an executor before;

1 *E.* 3. *cap.* 11.

10 *E.* 3. 2.

but

but for to take away the doubt that some had of it, and so an executor of an executor may have all actions that the Common Law gives to the first Executor, and so may have actions of Covenant; and if not, they should have it by equity of the *Statute* of 25 *E.* 3. *cap.* 5. Admitting that the word (*Assignee*) was void, or omitted out of the Covenant; yet this Lease here shall be made to the Executor, for that the intent which is the chief thing to be considered in every agreement, was such, which shall be performed so near as may be, or the words shall not be effectual; and the chief effect of the agreement was the estate which should be made, not the person to whom: but if a Tenant bind himself in a Covenant to do corporall service to the Lord, he cannot do it to the Heir or Executor, because it must be done to the body of the Lord; and if I perish, the thing also perisheth.

In some cases if the intent performed, and not the words, it shall be good as in the cases of *Litl.* *fol.* 82. That the Feoffee shall re-infeoff the Feoffor, and his Wife, and the Heirs of their two bodies, for it is not requisite alwaies, that in agreements every thing ought to be performed according to the words; for if the Mortgagee accept of another thing in another place it shall be good, (*Litl. fol.* 79) So if the Obligee cometh not to the place at the day appointed to receive his summ, he hath not lost it. 7 *E.* 44. but 19 *H.* 8. 12. if the Obligee sue for the penalty, the Obligor ought to shew that he was ready at the day & place, and say that he is yet ready. So payment of a lesser summ at another place, (*Perk. fol.* 145.) or before the day 10 *H.* 7. 14. good. So *Litl. fol.* 77. upon a Mortgage, the Heir or Executor of the Feoffer was to pay at a certain day, if they

291. vide ante, *fol.* 6.

P. 7. E. 4. *fol.* 4.

they say before it shall be good, and *Lit. fol.* 76. the Feoffee of the Feoffee pays at the day, and good; because he hath interest in the Land. So 17 *E.* 3. assi. pl. 2. the Disseisor Grants by Indenture, That if the Disseisee paies unto him 10. l. such a day, that one release which the Disseisee hath made to him, shall be void, and before the day the Disseisor makes a Feoffment, and at the day 10. l. was paid to the Feoffee: and if the Words be performed, and not the intent, as it may be in some cases, yet the agreement is not performed, as 21 *H.* 6. 10. one binds himself that his Feoffees of the mannor of D. shall Grant out of it 40. s. annual Rent to the Plaintiff, he hath three Feoffees and two Grants, it is nought, because he intended that all should do it; for there but two parts of the Mannor are charged. So 3 *H.* 7. 4. one bindes himself to infeoff me of the Mannor of *Dale*, he infeoffs an other of parcel, and afterwards me of the Mannor, he hath performed the words but not the intent, which was, That I shall have all the Mannor as then it was. So in the case between *Colthirst* and *Bejushin*, *si vellet inhabitare & residens*, &c. during the Term, intends all the Term. So 10 *E.* 4. 16. the words of a verdict true, yet the verdict false, because he brought his Writ of Annuity as Abbot, and prescribed so without naming of himself Parson where he had the annuity in right of his Parsonage; so the new Lease here shall be in the Executor of the Executor, to the use of the first Testator, because the Title of Covenant cometh to him derived from the first Testator; and that which is done in performance of the Covenant, ought to be in him in such degree as the Covenant was in him.

vide ante, *fol.* 23.

vide ante, *fol.* 21. 23.

292.

So 11 *H.* 6. 11. An Executor Assignes Auditors to one which was an Accomptant to the Testator, and

and he is found in arrearages; the Executor shall have Debt in the Detinet onely, because the Debt shall be in him as Executor, and hath a respect to the foundation. So 32 *H.* 8. and Doctor and Student, 92. One hath a Villain for years as an executor, the Villain purchaseth lands, the executor enters, it shall be to the use of the Testator, and assets in his hands, because the Villain which was the cause of it, was to such use. So here the Covenant, which was the cause of the Lease, cometh to the executors in right of the Testator, and to the same use shall the Lease. The Court increases the costs here.

Osburn *against* Carden *and* Jay.

294.

A Woman guardian in Soccage taketh Husband, they make a Lease for years of the Land to commence at *Michaelmas*; and before *Michaelmas* the Lessee maketh a Lease for a lesser Term of years; the Husband dies, the Wife enters, and being outed, bringeth Trespass, and adjudged lawfull.

M. 7. *and* 8 El. *in* K. Bench Tr.

For that the Lease is avoidable by the Wife, because she hath the Wardship to another use; and by reason of Natural affection presumed by the Law to be the neerest friend for the proximity of blood, for that the Custody of him cometh not to the executor, *Litl. fol.* 27. The Custody cannot be given by the Husband, or forfeited by Utlary or Attainder longer then during the life of the Guardian; because no such Natural affection there; 33 *E.* 6. 55. But the Husband hath interest in the Custody in the right of his Wife, for to participate with his Wife in all matters of interest and Prerogatives, because

because they are one person in Law, but loseth his interest when his Wife dies, because *Cessante causa cessat effectus.* And although Doctor and Student saith, fol. 13. That the Wife cannot avoid the Act of the Husband, as to give, Demise, or sell Chattels, real or personal, which she hath to her own use; yet here she may, because she hath it in anothers right; and the Wardship of the body, which is the principal, remains, which shall be maintained with the profits of the Land, and this is in effect the suit of the Ward by the woman.

Caril *against* Cuddington.

295. M. 7. & 8. El. *in the Court.*

A Woman seized of 2. acres in Fee, the one holden of the Queen by Knights Service onely, the other in Soccage, taketh Husband, she and her Husband levies a Fine *sur Conusans come ceo* of both; the Conusee Grants and Renders to the Husband and Wife, and the Heirs of their bodies, Remainder in Fee to the right Heirs of the Wife, the Husband and Wife die, their issue within the age of 14. years, the Grand-Mother on the part of the Mother enters, and the Grand-Father on the part 297 of the Father of the Infant, sues as next friend in the Court of Wards, because that the Queen hath the Wardship of the acre holden by Knights Service, and of the body: and adjudged that the Grand-Father on the part of the Father, shall have the wardship of the acre holden in Soccage as Guardian in Soccage, and not the Grand-Mother; for that the Grand-Mother by possibility may have the Land by discent after the estate Tail determined, and the Grand-Father cannot; but they are in equal degrees as to the estate Tail, & the Wife here is a purchaser

after by the Fine of the Fee-simple, and the Law is all one of land only, as if it were of the land, and body also.

Sherington &c. *against* Stratton.

Andrew Bainton by Indenture, Covenants and Grants with his brother *Edward*, for the affection that he hath, That the Lands shall discend and come to the Heirs males of their own bodies, and continue in the blood and name of the *Baintons*; and also for brotherly love and good will, That he, his Heirs and Assignes, shall stand seized to the use of himself for his life, and after to the use of *Edward Bainton* for his life, and after to the Heirs males of the body of *Andrew*, and afterwards to the Heirs Males of the body of *Edward*, and adjudged that every of the considerations by it self, being grounded upon Nature, is sufficient to raise the uses according to the Limitation, although it were without Deed. And so Covenant and Grant, that he will stand seized to another use by Indenture, without any valuable, or natural consideration, is good enough, for that the deed imports consideration in the Will of the Covenantor, by *Plowden*. *Quære* notwithstanding. 300. M. 7. & 3. El. *in* K. B. Tr.

Fleetwood, and *Wray* for the Plaintiff. An use is a confidence annexed to the estate with which he parts: An use may be created by the Common Law, First by Transmutation of Possession, as by Feoffment, Fine, or Recovery to the use intended. Secondly, without Transmutation of Possession by one Act done, importing good consideration, which shall make the land subject to the use; as a bargain and sale, or Covenant, or Grant upon good

because they are one person in Law, but loseth his interest when his Wife dies, because *Cessante causa cessat effectus*. And although Doctor and Student saith, fol. 13. That the Wife cannot avoid the Act of the Husband, as to give, Demise, or sell Chattels, real or personal, which she hath to her own use; yet here she may, because she hath it in anothers right; and the Wardship of the body, which is the principal, remains, which shall be maintained with the profits of the Land, and this is in effect the suit of the Ward by the woman.

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of the Father of the Infant, sues as next friend in the Court of Wards, because that the Queen hath the Wardship of the acre holden by Knights Service, and of the body: and adjudged that the Grand-Father on the part of the Father, shall have the wardship of the acre holden in Soccage, as Guardian in Soccage, and not the Grand-Mother; for that the Grand-Mother by possibility may have the Land by discent after the estate Tail determined, and the Grand-Father cannot; but they are in equal degrees as to the estate Tail, & the Wife here is a purchaser

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Fleetwood, and *Wray* for the Plaintiff. An use is a confidence annexed to the estate with which he parts: An use may be created by the Common Law, First by Transmutation of Possession, as by Feoffment, Fine, or Recovery to the use intended. Secondly, without Transmutation of Possession by one Act done, importing good consideration, which shall make the land subject to the use; as a Bargain and sale, or Covenant, or Grant upon good

good consideration. First by a new Act done in two parts, 21 *H.* 7. 18. and 6 *E.* 6. by bargain and sale, viz. Land for mony, or 36 *H.* 8. Covenant for marriage, because advancement to the Daughter, and comfort to her Parents. Secondly, where of one part onely, as Covenant for Natural affection from the Father to the Daughter, or Brother to Brother, and a desire to have the land continue in his name and posteriry. For a new thing to be done by both is not requisite by the Councel of the Defendant.

302. But long acquaintance, ancient familiarity, that they have been Scholars in their youth are no considerations to raise a use, because they are no considerations of value, or recompence; as if I promise to pay to you 10. l. because you are my Brother or old acquaintance, it is *Nudum pactum* and so note that a use was at the Common Law. A new use cannot be Created without consideration, but being created, and in *esse*, may be granted over without consideration as another Charter and (Doctor and Student, *fol.* 99.) may be devised.

Ex nudo pacto non oritur actio.

303. 1. *Bromley*, and another Apprentice, with the Defendant; and they Grant that there are two waies by the Common Law to make a Use without Transmutation of possession, viz. Bargain and Sale, and Covenant upon Consideration, proved by the words of 27 *H.* 8. cap. 10. and Consideration arising from the one part onely, good; and it is not requisite to have Consideration, and a new thing done by both the parties.

First Conſideration.

It is natural to engender, and nouriſh after engendred, or otherwiſe the firſt is without effect; the Father ſhall have the Cuſtody and Education of his Son, for his natural affection to him, *Litl.* *fol.* 25. 33 *H.* 6. 55. and Treſpaſs for taking away his Son, *Fitzh. nat. br. fol.* 143. and 3 *E.* 4. 12. And the Son ſhall have an Appeal of the death of his Father before others for his earneſt intent of revenge, and his reciprocal love. So a Feoffment to the Son, a ſuit depending, is not Champerty, 6 *E.* 3. cap. 274. yet within the words of *Articuli ſuper Chartas*, cap. 2. becauſe by all Laws the Son ought to aid his Father, and ſo out of the intent of the *Statute*; and there by *Herle*, the Son may abet his Mother to bring an appeal of the death of her husband, and ſhall not anſwer Damages. And *Litl.* 8. The Son and Heir apparent endows his Wife *ex aſſenſu patris*, good without Livery, becauſe the wife of his Son is as his own wife, for the love that the Law preſumes is between the Father and the Son, and within his Charge. 304. *Cuiq; naturale eſt id quod procreavit tui.* 33 H. 6. 55.

So *Litl. fol.* 4. the Donor ſhall pay Rent untill four degrees paſt upon a gift in Free-marriage (upon another gift, not) becauſe the Daughter advanced; and the Husband from thenceforth undertakes to find his Wife all neceſſaries; I promiſe 20. to one, if he marries my Daughter, he ſhall have Debt for it in our Law, becauſe the Daughter is advanced, and ſo conſideration proceeding from Nature, is a ſufficient Conſideration in our Law, 22 *E.* 3. aſſ. pl. 70. *Fitz. nat. br. fol.* 44. *a.* and 120. Doctor and Student 105. And ſo the Conſideration here of *A. B.* for proviſion for his iſſues males 305. 22 *E.* 3. *lib.* Aſſ. pl. 70.

is a good Consideration to change the use of the land.

Second Consideration.

For the continuance of the Land in the name of the *Baintons*, and it is good, to raise an Use: for Males continue their Sirnames, and Females change them by marriage, and the Male is most Soveraign, 40 *E.* 3. 37. 2 *H.* 4. 1. 27 *H.* 6. 8. and the Female, and all inheritance, is subject to the will of another, 17 *E.* 4. 5. I promise 10. l. to a laborer, for to repair a high way, or to a Surgeon for to cure such a man, he shall have an action of Debt, because it is Charity. Doctor and Student, 105.

306.

Third Consideration.

The good will, and fraternal love which he hath to his blood, and his brothers which is the nearest degree of blood after Parents and issues are good considerations here; and so it seems by the better opinion, in 20 *H.* 7. 10. but is not there adjudged, and they that joyn in blood by nature, joyn in love; and therefore if the youngest Son enter after the death of the Father, the elder shall have an assise of *Mauncestor*, but no other action contrary to 21 *H.* 6. 15. by *Portington*; because the Law intends that he entred as a friend to preserve the inheritance in his absence, because so near in blood, the Law intends as near in love. So *Littl. f.* 93. and 40 *E.* 3. 24. a discent of the Puisne, or any of his issues shall take away the entry of the eldest, for the cause aforesaid. So *Litl. f.* 160. Warranty Collateral Bars without assets, because the Law presumes that he will advance him as much as he hath prejudiced him by the War-

Warranty. So no battail between Brothers or Cosens in a Writ of right. But a *Nuper obiit* lieth against Brothers and Sisters in Gavel-kind, where their ancestor died seized; or a Writ *De rationabili parte*, against him which enters into all, which Writs are to try blood onely. So to say, A Juror is Brother or Cosen to one party is a good challenge in every action, for the affection which the Law presumes the one hath towards the other, 21 *E.* 4. 33. And *Bromley* said, That 11 *H.* 4. 12. by *Tirwit* and *Cascoigne*, by the ancient usage, all the blood of him which was Murthered, should draw the Felon found guilty, in an appeal of Murther, by a long cord to execution, for the losse which all the blood had by the Murther of one of them, and for the revengement of his death, and love that they had to him that was killed. 307.

Fourth Consideration.

Consideration was the Marriage had between *Edward Bainton*, and *Agnes* his Wife; Remainder upon Natural Consideration shall preserve the particular estate made without Consideration, which precedes it, (but not on the contrary) if the estate upon natural Consideration precede the other estate; as *A.* Covenants with B. in Consideration that *B.* will marry his Daughter, to stand seized at the time of the Marriage to the use of himself for life, after to the use of *I.* in Tail, afterwards to the use of *B.* and his Wife, the Daughter of *A.* is a good use to *I.* without consideration; for the Marriage is private, and several Considerations for the estate of *B.* and his Wife; because the Remainder to *I.* precedes the estate to *B.* and his Wife; but if the Remainder to *I.* had been after the estate of *B.* and his Wives, the estate there had been void to

I. but money might have been given in Consideration of all the estates. In *Mordants* case, 21 H. 7. 19. No use was raised there, because the Covenant was in the future Tense, and also incertain; and therefore was put to his Writ of Covenant there.

308. Good and sufficient Consideration, raiseth an Use without Deed; so a Deed raises Uses if there be any Consideration; for it is made to some effect, or otherwise should be void, because you shall not have an action of Covenant here, because an action of Covenant lieth upon a Covenant only in the preter, or future Tense, and not in the present Tense.

1. Contract, or Agreement for Lands, or Chattels, is by the Law, First, by Writing; Secondly, by Words.

First, An agreement by writing, without Consideration, is not *Nudum*; because a man hath great consideration, and deliberation in passing things by Deed; for the writing, his sealing, and delivery of it, signifies fully his will, and is sufficient consideration, that Land shall passe as his will is, and shall bind the party without thinking what cause he hath to do it. Secondly, an Agreement by word without consideration, is *Nudum*, and binds not; because words passe from a man suddenly, and without advisement many times, as 17 *E.* 4. 4. I
309. promise to give you 20. l. for to make your sale of new, it is *Nudum pactum*; if it be by Deed, you may have Action of Debt upon this Deed, and the Consideration there is not examinable, and the cause of the Deed is not inquirable; for every Deed imports in it self a Consideration without the will of the party which makes the Deed. So 11. H. 4. 38. A Carpenter by word, without writing, under-

undertakes to make a new house, and no consideration for the making of it, there it is a *Nudum Pactum*, but if it be by writing, it is good: So 45 *E.* 3. 14. for that the Plaintiff demanded a Debt upon a contract for marriage money by Deed, an action lies at the Common Law, because there it becometh a Law Contract by the Deed, but it should have been sued in Court Christian, if it had been without Deed, because the marriage which is the consideration, is a thing Spiritual, 14 *E.* 4. 6. 15 *E.* 4. 32. which books are against the opinion of *Thorp* in the said case in 22. ass, *Nudum pactum est ubi nulla subest causa præter conventionem; sed ubi subest causa, fit obligatio & parit actionem.*

vide ante, fol. 35.

Information for Mines.

THe King shall have all the Mines of Gold and Silver in the Lands of his Subjects, by the Prerogative of his Crown, and not by the propriety of the Soil, although it be not recited in the Treatise of Prerogative; and albeit the Oar thereof in others land, toucheth others Free-holds, and inheritance, which is proved by three reasons; First for the excellency of the matter, which being more excellent, is appropriated by the Law to the person most excellent, *viz.* the King. So the King hath by the Common Law, Whales, and Sturgeons, because they are the most excellent fishes that the Sea, or water renders. 315. H. 10. El. *in the Excheq.*

So that the Treatise of *Prerogativa Regis cap.* 11. which saith, *Rex habebit Balænas & Sturgiones*, is but a Declaration of the Common Law before. Secondly, for the necessity of defending his peo-

ple, and preſerving the Common-wealth againſt forreign hoſtility. Thirdly, for the commodity of his Subjects, That they by the Coin made thereof (which the King onely may make) may have between them mutual Commerce and Traffick; but admit the ſubject ſhall have Gold or Silver found in his own land, he might not convert it into Coin, for falſifying or counterfeiting money, was Treaſon at the Common Law; and for that cauſe, a woman was burnt, 23 aſſ. pl. 2. Alſo it would be inconvenient to the weale Publique, That a ſubject which is proprietor in the land, ſhould have it; for that he thereby would exceed the King in Treaſure, which would be perilous to his eſtate.

25 E. 3.

316.

The ſecond proofe was by preſidents of three ſorts.

317. First, Commiſſions, Grants, and Demiſes, by
318. which the King hath Granted ſuch Mines in others
32 E. 3. rot. 4. Lands, *viz.* in Annis 32 *E.* 3. 8 *R.* 2. 5 *H.* 6. 15 *E.* 4. and *primo H.* 7. and in ſome of them the King gave
3 R. 2. rot. 22. licence to digg in another land without licence of the owner; and where ſome of them ſaith, *habita*
2 H. 4. rot. 34. *licentia fodiendi*, which is intended land ſubject where they give amends for the digging, or Aſſigne
5 H. 6. rot. 16. part to the Lord of the Soil; this is of courteſie and clemencie of the Prince, and not of neceſſity.

15 E. 4. rot. 20. Secondly, Accounts of the Grantees of ſuch Mines.

18 E. 4. rot. 31. Thirdly, Informations, and Impleading of them which have diſturbed the Grantees, or Imported
1 H. 7. rot. 92. their Oar; alſo the King may puniſh him which taketh Oar in another mans Soil. And ſo Char-

320. ters, Accounts, and Pleas againſt the takers of Gold and Silver in the Soil of another, prove ſtrongly thoſe Mines to belong to the King by his Prerogative; for the Records of every Court, are

the most effectual proofs of Law in matters Treated of, in that Court; and account lies not against 321.
an Executor by any, except for the King. *Litl. f.* 28.
The King may seise the Land of his Debtor which he hath by what means, or whosoevers hands it cometh to, after the cause of the Debt. Sir *William Gadish* case in the *Exchequer.*

The 3. proofe is upon authorities of Law, *viz.* The book called, *Exposition of Terms of the Law*, and the Reading of *Hescot* of *Charta Foresta*; and the Laws of St. *Edward* the *Confessor*, and *William* the Conqueror: and so those Authorities, and the said presidents, and the reasons aforesaid, for the excellency of the Metal, and for the necessity of it, 322
and the publique good, agreeing in one, That the King shall have all Mines; and Oars of Gold and Silver in Land, is Treasure found. *Thesauri de terra* taken for Gold and Silver in Land, is Treasure Trove; the use and continuance Ratifies this Prerogative by prescription, although that it need not be contained in the Treatise of *Prærogativa Regis* for the King; the Common Law hath many which are not there recited, as if Tenant of the King aliens without licence, it was a forfeiture before the Statute of 1 *E.* 3. cap. 12. 9 *E.* 3. 26. although it be to the prejudice of another Free-holder; yet because the Law gives those Mines to the King, it giveth to him all necessary meanes to have it, by digging with all incidents thereunto: for every Prerogative contains in it self prescription, for it is in usage; and as prescription and usage will give title or interest to the King in the Free-hold of another. As by Prerogative the King might enter into the woods of another, and take Trees for to repair his Castles before the Statute of *Magna Charta*, cap. 22. so he might Afforrest another

mans woods, before the Statute of *Forresta*, cap. 2.
323. So 7 *H.* 2. he might break a Pond, and take the fish for his provision. So 27 ass. pl. 49. The Lord might not take his Villain (yet is his freehold and inheritance) in the presence of the King, for it is a Protection to him for the time. So 13 *E.* 4. 6. The King may distrain for his Rent Charge in all the other Lands of him which ought to pay it. So that the Prerogative of the King chargeth his other Freehold to the Kings distress.

The King shall have by his Prerogative Mines of
325. Copper, containing Gold or Silver in the Lands of another; because they are as a thing entire by the Commixture; and *magis dignum trahit ad se minus dignum*, as 41 *E.* 3. 32. 36 *H.* 6. 26. and 3 *H.* 7. 14. The Heir shall have the Charters with the Box, if it be sealed: so Carts to which Horses are tyed, if it fall upon a man, the King shall have all. *Stamford fol.* 20. because as one thing the altogether occasion his death. So the King shall have all the Obligations, and Horses where one of the Joynt-Tenants is attainted; because a thing entire proves that the King shall have all: so
326. is where Gold or Silver is mixt with base mettal as in the 7 *E.* 3. and 17 *R.* 2. 7 *H.* 4. 17 *H.* 6. 30. and 31 of *H.* 6. and this was proved, also by accounts for Silver and base Mettal; and because no Mine of
327. Copper is void of Gold or Silver, no Mine of Tin void of Silver, and therefore those of *Devon* and *Cornwall* for digging in their Land, and in others Land for Tin, and to have this to their use, derive their power from the Kings of this Realm made unto them, and giving them such liberties as by Charter, 33 *E.* I. confirmed by *R* 2. but the power given to them for to
328. digg in anothers Land, and to pull down houses of another, was restrained by the *Statute* of 50 *E.* 3.

wide ante, *fol.* 143. 219.

Darby

...by-shire, and other places prescribes to take Lead ...Mines steril, which is without Gold or Silver, ...bout paying any thing.

On the part of the Earl against the Queen. The ...ing of the most in value, is worthiest; where the ...antity of Copper exceeds the quantity of ...old, yet the lesse is the most precious, quantity ...r quantity; the Gold or Silver ought to be of ...ore value, then the charges of separating of it 329.
...om the base Mettal cometh to, otherwise this *ali-...id nihil est* if he hath lost by it, *Wast.* of 2. d. is not ...istable, because *de minimis non curat Lex.* 9 *H.* ...36. 38 *E.* 3. 7. by this reservation upon the said ...emises, it is intended a good quantity of Gold ...Silver. Also because the information sheweth ...t what value of Gold or Silver is to defray the ...arge which is incertain, and so bad, because this 330.
...the Declaration of the King. Also Commissi-...ns are not of great estimation, but shew the obe-...ience of Subjects, and are made at their requests ...r whom they are granted; and many of the said ...Commissions and Leases were limited, That the ...Grantee should answer to the owners of Lands in ...*nwal* used for the digging of Tin before the ...id Charter, and this is proved by the words them-...lves, *viz.* That for the amendment of our Stan-...aries, *&c.* and other words in the Charter; and ...lbeit the King had some profit of Tin, or Lead in ...ome places, as a toll dish of Oar, that was not in ...espect of the interest the King had, but for the ...earing of the Charges of Officers, as he had of ...Merchants of some part of their Marchandizes, for ...the searchers, Controller and Waigher, because he ...appointed Officers for that purpose.

By

By thoſe of the Earls Councel it was ſaid, as to the third point, That if the Law were ſuch that the Mines of Copper in the lands of Subjects, ſhall be the Kings by his Prerogative, yet here thoſe Mines and Oar in queſtion, paſſe to the Earl by the Letters Pattents of King *Philip*, and Queen *Mary*. For as to the firſt Plea, they take that the vein wherein the ſaid five hundred thouſand weight of Copper was digged, could not be called a Mine at the time of the Letters Pattents granted, nor paſſe by the name of Mines, for that then the vein was cloſed; and therefore paſſe by the grant of the Soil as parcel of it. And in the ſecond Plea, the Vein and Oar paſſe by the words *Omnes & ſingulas Minerâ*, &c. which admit no exception, and ſhall be taken ſtrictly againſt the King, for thoſe clauſes, viz. *De gratia ſua ſpeciali*, pretends great favour and bounty towards the Patentee, and that (*ex certa ſcientia*) excludes any ſuggeſtion; and the Great Seal is in witneſſe of Truth, and not impugnable in Credit; if the King gives a Mannor that he hath by eſcheat or purchaſe, as intirely as *I. S.* held it, there the advowſon paſſes, 43 *E.* 3. 22. (and agreed here) yet is not taken there but by implication, That the King is knowing of his right, and ſo the King here ſaith by expreſſe words.

T. 43. E. 3. 22. 331.

If the King recites the Grant by his Predeceſſor, and ſaith, *Ex certa ſcientia*, this concludes him but if he ſay [as we are informed] that concludes not the King, but is as if ſuch grant was not made: *Huſſey*, 9 *H.* 7. 2. The King *Ex mero motu*, and *Ex certa ſcientia*, pardons to *B. Omnia debita & computa*, it diſcharges a debt due by him as Sheriff, becauſe there it is a generall pardon, 1 *H.* 7. 137. Incertain Return, and the King deceived, becauſe upon ſuggeſtion, made the Charter void. As three uſurp preſen-

cations

ctions, and the King reciting one of the Usurpati-
ons, restores the Patronage to him, upon which the
Usurpation was, this is a void Charter, but adjudg-
d good, because of *Ex certa scientia*, in which case
the King shall not say, He was deceived or ignorant, M. 3. H. 7.
3 H. 7. 6. So 22. E. 4. 44. The King grants *De* ret. 10.
gratia sua speciali, to the *Abbot* of *Waltham* to be dis-
charged of the Collection of Tithes, which shall be
granted by the Clergie of *England*, and Province of
Canterbury, onely in their convocation, grants a truth
to the King. Notwithstanding which the Grant was
adjudged good, and the *Abbot* shall be discharged. So
9 H. 6. 34. and 37 H. 6. 31. *A.* Returned upon an
Exigent *quarto exactus*, where he was Outlawed, and
after the King pardons him *Ex mero motu*, and *De*
speciali gratia, all Misprisions, Offences, Contempts,
and Deceits; there the Amerciament is released by
the general words, because the Law intends that the
King is informed of the thing pardoned, as by ex- 332.
cels words in special. So 41 ass. pl. 19. The King
Grants *De gratia speciali* to *S.* That he may give
the house whereof he was seized in *Mortmain* it is
good yet recites not the Tenure in Burgage holden
of the King, and the house was holden of the King
in Free-Burgage.

The third point argued by the Queens Councell.
First by the Kings Grant *Ex mero motu*, *certa*
scientia, and *gratia speciali*, Mines of Gold and
Silver, or other Mines Royal, will not pass, although
that it appeareth, that it was hidden at the time, and
appeareth afterwards; otherwise of base Mines, for
those pass, but not Mines Royal which are Collate-
ral things to the Soil, as are hidden Treasure, which
passeth not by the gift of the King; nor *Wreck*,
Estraies, *Waifs*, &c. passe not; nor do liberties
pass by the Grant of a Mannor. As the King gives a

Man-

Mannor within a Forreſt which eſcheats to him, yet the Donee may not cut his woods within it, without licence of the Juſtice of the Forreſt; and the Mannor remains ſubject to the Paſture of Deer and wild beaſts of the Forreſt; and ſo things collateral to the Soil, (as are things of *Prerogative* and liberty,) paſſe not by the gift of the Soil. So Livery to the Heir gives not Right.

The King aſſignes Dower to his Mother, but the King ſhall aſſign it by his Prerogative, without the Clauſe (*de ſalva* to the Wife her Dower, by the King *aſſignanda*) and upon this reaſon he put the caſe of 31 *E.* 3. Three Coperceners of an Advowſon, the one within age and in the Kings Ward, which Grants the ward and Marriage of him, and the Fees and Advowſons appertaining to the Ward. The King ſhall have all, *viz.* the preſentment of the eldeſt and middle Siſter by his Prerogative, becauſe entire, and his Prerogative takes away the elder and middle Siſters to preſent: And the King hath three preſentments in the Wards right, and it paſſeth by his Pattent, but that right which the King is intituled by his Prerogative, paſſeth not without expreſſe mention. A Pattent *ex gratia ſpeciali*, &c: ſhall be taken favourably to the Pattentee, *viz.* as to the thing expreſſed in the Pattent, which the words ſhew to be intended to paſſe; but this will not make another thing to paſſe not expreſſed or ſhewed to be intended by the words of the Pattent to paſſe. The King had the ſecret Mine of Copper mixt with Gold and Silver in Land given by his anceſtors to the *Prior* of *Wenlock*, and there it paſſeth not by the Grant of the Soil. *Ex mero motu*, &c. yet it was of the foundation of the King, but the Religious were favored, Fitz. *nat. br.* 332.

T. 31. E. 3. 333.

Secondly,

Secondly, by the Kings Grant *De omnibus & singulis mineris ex certa scientia*, &c. Mines Royal, of Gold and Silver, or of base mettal, containing in it Gold or Silver, passes not, because the King hath them *Ratione Coronæ*, not of the land, and because they be appropriate to his Crown, they passe not without special words; base Mines here, those which consist onely of base substance, *viz.* Copper, Tin, Lead, Iron, or Coles, and not having in them Gold or Silver; and Pattentees shall have things fit onely for Subjects; and though the terms of the Pattent comprehend things annexed to the Crown or of great importance; yet they shall be construed to passe the things but of the basest degree, 22 ass. pl. The King Grants to the Master of *Leonard, Omnia catella tenentium suorum Feloniæ de tercunq; damnatorum*, and his Tenant kills the Kings Messenger, there he shall not have them, because it was intended of common Felonies onely.

So the Kings Grant of the Return of all manner Writs, the Grantee shall not have the Return of 334.
Summons of the Exchequer; because it concerneth the King himself there.

So 2 *R.* 3, 4. 2 *H.* 7. 7. The Kings Grantee of Amerciaments of his Tenants, shall not have the amerciament of his Tenant which holdeth of him, and another, because it is before other Tenants, as well as my Tenant.

Charters of the King taken according to common intent, and other things which have not common intent, shall not passe from the King by his Charters. And therefore 3 *E.* 3. the King Grants to an Abbot, That he and his Successors shall be free of repairing of Bridges, Cawseyes, and Walls, and discharges not him for repairing of such which hath been used to repair by prescription, as Lord of

of the Village: but it is good otherwise of a Town to which the King hath Granted Murage, Pannage or Pontage.

So 9 *H.* 56. The Grantee of the King with Warranty, shall not have in value, without precise words but he may rebutt. So 2 *H.* 7. 8. The Grantee of the King of all Fines and Amerciaments in such County, he shall not have Amerciaments if the Sheriff, Coroner, or other great Officer is Amerced, because Royal; and a Grant shall enure for common things in intendment, and the King shall have them speciall.

vide ante, fol. 243.

So 43 *E.* 3. aff. pl. 15. The King Grants to his eldest Son the *Dutchie* of *Cornwall*, *cum omnibus Wardis, Maritagiis*, &c. And one which held of the *Dutchie* by Knights Service, and which held also one which was in Ward, because if a Ward holds Knights Service dieth, his Heir within age; the Prince shall not have the Wardship of him, but the King: because a thing pertaining to the Crown passeth not without special words. So the King maketh a County Palatine, and giveth it to another, *Jura Regalia* also, and that Pleas within the County shall be determined there, yet he himself shall sue at *Westminster*, his actions arising within the County Palatine, as 3 *E.* 2. For an advowson in the County Palatine of *Durham*, the King brings his *Quare impedit* in the Common Pleas; the Defendant pleaded to the Jurisdiction of the Court, and was compelled to answer.

43 *E.* 3. li. Ass. pl. 15.

M. 5. E. 2.

So an Abbot by the Kings Grant made to him for the amortizing of Land, or Tenements, may not purchase an Advowson holden of the King, *Capite*: and this case by *Wray*, differs from the case in 41 ass. pl. 19. for there the Charter names the house, but names not what Lands, by which

335.

vide ante, fol. 332.

cannot be intended that the King was mistaken in the Tenure, and therefore it is good there, and not for the cause of *Ex gratia speciali*. So 19 *E.* 3. he might not appropriate an Advowson holden of the King, although he had licence so to do. So 1 *H.* 7. 3, and 26. A sanctuary for Treason shall not be without speciall Words: *Ex mero motu*, &c. will not passe other things than the nature of the words contain. And therefore the King Grants to a man and his Heirs males, *ex certa scientia*, &c. passeth not heritance, 28 *H.* A Felon may not wage battail against the King, because dangerous for the King. *Stamford*, *fol.* 180. and 182. nor against those of *London* in an appeal by the Kings Grant, 20 *E.* 3. P. 20. E. 3. 336. so if one takes the Kings goods wrongfully, the King may seize his goods untill restitution; and 3 *R.* 2. if any take Toll of those of the Town of *Lynn*, they may by the Kings Grant take *Withernam* of those another time within their Jurisdiction. And by the Law the King may grant a part of his Prerogative to another in these cases: *à fortiori* there he may do it in this case where the thing is not but revenue or profit. These words *ad humilem Petitionem nostris*, diminisheth the force of the Patrent, by *Catline*; by *Plowden*, if Gold or Silver will not defray the charges, the King shall not have it, because no Metall without them; but because the party shewed it not as our case is, the Queen shall have Judgement. And this point was not put to the Judges to adjudge, because that the Defendant confessed that it contained Gold, which is intended to be of good value because the best for the King.

Bret

Bret *against* Rigden.

342. Tr. 10. El. *in the* Com. Pl. Repl.

A Man ſeized of 10. acres Soccage, Deviſes his Lands by writing, and after purchaſes acres Soccage, and the Deviſee dieth; the Devi ſaith to the Son of the Deviſee, That he ſhall his Heir, and have all the Land that his Fath ſhould have had if he had ſurvived him; a dies: Adjudged that he ſhall not have the acres.

1. If the Deviſee ſhall have the Land chaſed by the Deviſor after the making of Will.

Manwood for the Defendant ſaid, That it ſh be preſumed that every one knows the Law in indifferent; and that the Will is of no effect un the death of the party; for ignorance of Law cuſes no man, and the date and writing of the W is not effectual, but the words of the Will ſhall conſtrued as they were ſpoken at the time of death.

And therefore if a man Deviſeth a Mannor in and ſhortly after a Tenancie eſcheareth, and that the Deviſor dieth, the Deviſee ſhall have Tenancy, becauſe parcel of the Mannor at death of the Deviſor when the Will taketh effe yet if a man onely reſpect the date of the will, eſcheated tenancy then ſhall nor paſſe.

A woman Deviſeth Land by her will, and takes Husband which dies, and ſhortly after the man dies, the Deviſe is good, becauſe ſhe is diſco when it took effect, as ſhe was when ſhe made will, and marriage cannot countermand it, wh was not of effect in her life. Alſo becauſe it

tends no exception for the generality of the words. As if she had devised all her plate, and after bought plate and died, the Devisee should have all his plate at the time of her death; for the amplenesse of his words declares his intent to be beneficially taken for the Devisee.

Lovelas, and all the Justices for the Plaintiff, to the contrary. That Land purchased after the making of the Will, cannot pass by the words, nor intent of the Testator. Because he had not the 12. acres at the time of the writing and publication of the Testament; it is no presumption that afterwards he would have, and is as if he had died when he writ and published the Will; and therefore cannot have an intent to give it; and the death which is the Confirmation of the Will, follows the first acts thereof, *viz.* the writing and publication of it; for every Act founded upon discretion, consists of three parts.

The first, Inception, which is writing of the Testament here.

The Second, Progression, which is the publishing of the Testament begun.

The Third is Consummation, which is the self same, and continues one through all these parts, or otherwise the Act is void of discretion. And by *Lovelas* it is proved, That the Commencement is to be considered in Wills; because if a woman covert Devise Land by her Will, and publish it, and her Husband dies, and after she dies, the Devise shall be void. So if an infant which maketh a Will, publish it, and dieth at full age, it is not in effect; because death without good Commencement, giveth not effect. And so the Commencement, and the intent of it, is to be considered in every act. 344.

So the Disseisee of two acres in Dale, releaseth all his right in all Lands in D. and delivers the release as a scrowle to be delivered the first of May as his Deed; the Disseisor before the first of May disseises him of another acre, and the release is delivered the 10. of May. The right as to the 2. acre shall not passe; because the first livery was void to this intent; so the consummation of it which is the second livery. So I have a Reversion of two acres that *I. S.* holdeth for life; after, I purchase the Reversion of another acre which *I. S.* holdeth for life; after *I. S.* Attourns to *B.* for all three, the third acre passeth not; for Attornment passeth not more then was contained in the intent of the first Grant. And so here, That which is not in the inrent at the beginning or Commencement of the Grant, shall not be in the intent at the consummation of the same; but if he had published his will after he had purchased the new Land, there, it may be, all might passe; for by the new publication his intent shall be taken, That all that which the words contain at the time of the publication will passe, and all that he then had, the Devise shall have. So if a man Devise a thing by a name certain, as the Mannor of *D.* or White-acre, and after purchase the same, it shall pass; for it shall be taken that he intended to purchase it, or otherwise the will shall be void to all intents, 39 H. 6. 18. *36 H. 6. 18.* But here when he hath ten acres, and Devises all his Lands, the words are satisfied in passing of the ten acres, and there is no meaning by the words for the land purchased after the Will, because the thing is not named certainly, as the Mannor of Dale, or White-acre. Also he may not Devise the 12. acres, because by *Dier* the *Statute* 32. and 34 *H.* 8. cap. 1. and 5. intend that the Devisor shall be seized at the time of the making of the

Will.

will, becauſe it ſpeaks of having Lands which he may Deviſe, and here he hath not thoſe at the time of the Deviſe. *Quære* of the caſe where he Deviſes by ſpecial name, and after purchaſes it, becauſe of the word [*having*.]

Second point, if the Land veſts in the Heir of the Deviſee where he dieth in the Life of the Deviſor.

Manwood for the Defendant. Becauſe it is more conſonant to the will of the Deviſor, and reaſon, That the effect ſhall take place, and the form periſh, rather then both ſhould periſh together: the Deviſee for life (the Remainder over) dies in the life time of the Deviſor, it is a good Remainder, and ſhall have the immediate poſſeſſion which is the effect; yet the form was for to have by Remainder. So if a Dean die, or a woman Covert taketh another Husband before their Deviſor dies, yet they are eſpecially named, and the Land ſhall veſt in the new Dean and his Succeſſors, and in the woman which is now the Wife of another, according to the intent, becauſe it cannot according to the words; and if the intent of a man in Conditions ſhall be performed, as 4 *H.* 7. by *Foy*, he ought to infeoff the ſurvivor and his Heirs onely where the other dieth: *à fortiori*, then, here the intent in Wils ſhall be obſerved where the words cannot, and the effect here is that the Heir ſhall have the Land, and it is the form of the limitation, that he ſhall have it by diſcent, 21 *R.* 2. Remainder *Eccleſia ſancti Andreæ* in *Holborn* is good. And the *Parſon* ſhall take by it, becauſe it was comprehended in the Deviſe, although he was not named. 345. S. 21. R. 2.

Lovelas, and all the Juſtices beſides *Walſh*, to the contrary. For by the death of the Deviſee, the Deviſe is countermanded, for that the Deviſee is not

in rerum natura, when the Deviſe took effect; and in all gifts be they by Deviſe or otherwiſe, there ought to be a Donee in *eſſe* capable when the thing ought to veſt, or otherwiſe the gift is void, and the word Heirs limits the eſtate, and not the perſons which ſhall take, and enables the Deviſee, as well to alien, as to permit it of Diſcent, for a Diſcent to the Heir is but a thing ſubſequent to the eſtate of Fee-ſimple firſt veſted in the Deviſee, and a thing at his pleaſure. And things of ſequel which enſue if the eſtate had been veſted firſt, (as are Diſcent, Dower, Eſcheat) are not good cauſes to make things veſt in others then thoſe to whom limited. And therefore the Heir ſhall not have the land here no more then the woman ſhall have dower, or Lord Eſcheat if he had died without heir, which ſhould be ſo if it had veſted in the Deviſee. And therefore if a man Deviſe a Leaſe or goods to *I. S.* which dies, and afterwards the Deviſor dies, the Executor of *I. S.* ſhall not have them.

The ſpeaking to the Son of the Deviſee, That he ſhall be his heir, *&c.* is void, for that the *Statutes* of 32. and 34 *H.* 8. gives licence and authority to every man to Deviſe his Lands by his laſt Will and Teſtament in writing, and thoſe are ſufficient in themſelves for to make the thing deviſed paſſe, and not regard words without writing, by all the Juſtices; but if he had publiſhed the Teſtament of new, the Deviſee ſhould have the 12. acres in this caſe, for that it had been as it were a new Teſtament but not his heirs.

Delamer.

Delamer *against* Birnard.

A Man in 13 *H.* 8. makes a Feoffment to the uſe of himſelf and his Wife in ſpecial Tail, Remainder to the Husband in general Tail, Remainder in Fee to the Brother of the Husband, and after in 26 *H.* 8. The Husband maketh a Feoffment to *A.* which infeoffs the Brother, being in Remainder in Fee. 2. *E.* 6. The Brother infeoffs the Defendant, the Husband dies, the Heir of the firſt Feoffee enters to revive the uſe to the Wife, and adjudged lawfull. 34 H. 8. 10 El. *in* K. B. Tr.

1. By the Feoffment of the Husband in 26 *H.* 8. all the eſtate of the Feoffee to uſe, is drawn out of him, and ſetled in the ſecond Feoffee and by conſequence all the uſes which were created out of the firſt Fee-ſimple are diſcontinued, and ſhall not be revived untill a re-entry of the Feoffee after the death of the Husband, and that he may enter then, notwithſtanding the Feoffment of the Brother.

2. The Feoffment of the Brother in Remainder, is not warranted by the *Statute* of 1 *R.* 3. cap. 5. for that he hath not uſe in poſſeſſion nor in *eſſe*, but only a right which he could not grant; neither ſhall it be executed by the *Statute* of 27 *H.* 8. but onely may paſs by Livery by way of Extinguiſhment. Alſo the *Statute* of 1 *R.* 3. extends to *Ceſtui que uſe* in poſſeſſion, and not in Remainder or Reverſion where they are derived out of one entire eſtate created by Feoffment; for although that the uſes are ſeveral yet the eſtate is entire which ſhall not be divided, but he may make a Leaſe for years, to commence after the particular eſtate determin-

1 *R.* 3. *cap.* 5. 27 *H.* 8.

ed which is Executory, and divides not the estate but where the estate and uses also are several, as a Lease for life to the use of one for life, and the Reversion granted to another for life, to the use of another for life, *&c.* There he in Reversion may grant the Reversion by the *Statute* of 1 *R.* 3. for that it is in possession by reason of the severaltie of Estates.

Cestui que use by the Common Law cannot meddle with the Land, for if he doth, the Feoffee may punish him in Trespasse. And if the Feoffee will not permit *Cestui que use* for to receive the profits, he hath no remedy but in the Court of Conscience, for the land was so fully given to the Feoffee by the Common Law, as if no use had been of it. And by the *Statute* of 1 *R.* 3. *cap.* 5. *Cestui que use* in possession onely may meddle with the Land for to make Feoffment, Lease, *&c.* and the Feoffee is onely seized of the whole Fee to the use of Tenant for life, or in Tail during his life, or the estate Tail, 4 *H.* 7. 18. And the Feoffment of *Cestui que use* or in Tail or for life is warranted by the *Statute* of 1 *R.* 3. and passe the Fee untill a Re-entrry, both by the letter and intent of the *Statute*; for if a woman Covert was *Cestui que use*, the husband might make a Feoffment, and it shall be good during Coverture by the intent of the Law, and the *Statute* giveth to the Husband during Coverture direction of the things of his Wife; and yet the claim of the Feoffees were not onely to his use but to the use of him and his Wife, 6 *H.* 7. 3. So two joynt *Cestui que uses* in Fee, the one maketh a Feoffment of the moity of the Land, and good, and binds the Feoffees yet they were not onely seized to the use of him, but by the intent of the *Statute* hath a moity of the use presently; and may give, or Lease the moity

1 R. 3. *cap.* 5.

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4 H. 7. 18.

6 H. 7. 3.

of the Land where the estates are several, and uses also; for, several uses issuing out of one estate, the several possessions of several uses, may not divide the estate, because there entire; yet there *Cestui que use* in Remainder in Fee may make a Lease for years to Commence when his use shall be executed, because then the Lessor shall have interest in the possession, and the Franck Tenement of the Feoffees shall not be taken away, nor their estates will be divided, but they shall have an estate for life, or greater, which he in Remainder cannot make without the dividing of the estate, or taking away of the Free-hold, because it passeth away presently, and is not executory as a Lease for years is. And if *Cestui que use* maketh a Feoffment to such a person upon Consideration with notice, or without Consideration and notice, there all the first estate, out of which all the uses do arise, is taken from the Feoffees, and a new estate is made by authority of the *Statute*, the which new estate shall be to uses newly expressed or intended, and not to the first use; but by this all the ancient uses are discontinued; the reason hereof seemeth to be before, for that one use cannot be raised out of another. The release of *Cestui que use* to the Disseisor of his Feoffees, is good, and bars them of entry, 14 *H.* 8. 7. and 27 *H.* 8. 29. a Disseisor infeoffs *Cestui que use*, which infeoffs is a stranger; by this the right of the first feoffees is gone, although that no use was in *Cestui que use* at the time of the Feoffment, as if *Cestui que use* had released to the Disseisor: But *Plowden* saith, That the greater doubt will be if the estate Tail was here determined, if the first Feoffee might enter, because the right of the use in fee was extinguished by the Feoffment of him in Remainder; But here for that the particular estate in use continues, which may not be defaced by him in Remainder, this is good

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14 *H.* 8. 7.

without doubt; by some of the Justices it was held that the entry of the first Feoffee shall gain the Fee-simple by the discharge of the use in Fee to himself, for that it was extinct in the possession of the last Feoffee; as of a rent which he in remainder had in the Land before his Feoffment, this shall be extinguished in the Land by his Feoffment; so of the use, and others held the entry of the first Feoffee shall revive the use in Fee-simple to him in Remainder which was the Feoffor, for that they could not have this at the time of the Feoffment made, because not in *esse*, but was discontinued at this time by *Cestui que use* in possession in Tail; and by *Plowden* and *Bromley*, he shall revive the use in Fee to the last Feoffee, for that this passeth to him by the Livery and the first Feoffee hath nothing in the Land to his own use, but onely to the use of the Feoffor. And it was not his intent that the first Feoffee should have it to his own use, but that the second Feoffee should have it, and so by his re-entry he shall revive the use to the last Feoffee by the course of the Common Law; for that the last Feoffment was by the Common Law, and not Warranted by the *Statute* of 1 *R.* 3. for the cause aforesaid; but this point was left at large; and if before *R.* 3. *Cestui que use* disseises the Feoffees, and infeoff others upon which the first Feoffees to use enter, they shall be seised to the use of the last Feoffees, because *Cestui que use* had given his interest to them; and his intent appeareth that they shall have it, and the first Feoffees shall not hold to their own use, because it is a Collaterall thing annexed to the person touching the Land, and not as a Rent issuing out of it: And use is but confidence, that the Feoffees to use shall do for the Feoffor as he would do if himself was seised; and so it is a difference be-

tween

ween a Use and a Rent, which Rent is only by reason of the Land, but Use also is annexed to the Person. And at last it was resolved by all the Justices that the entry was good, and did revive the use. And so Judgement was given for the Plaintiff.

Stowell *against* Zouch.

356. H. 11. El. *in the common Pleas Entry sur Disseisen.*

Disseisor Levies a Fine with Proclamations, the Disseisee dies after three years, and within the five years his Heir being within age, the five years incur after the Heir commeth of full age, and within one year after his full age enters. And adjudged that his Entry is not lawfull: but that he shall be barred by the Fine with Proclamations, and the five years notwithstanding his Infancy, for that the five years are once attached in his Ancestor, and then they ought to incur; for the purport of a Claim within five years, is a Condition in Law which shall bind an Infant.

357. Those which argued with *Stowell* for the better intelligence of the Statute (of 4 *H.* 7. *cap.* 24. which gives five years to every stranger) and of the reason of making it, thought the Fines, and their force at the Common Law and the incidents thereof, which consists in three points:

1. The nature of the Fine, and the puissance of it.

2. The preservations of the ancient right by Claim.

3. What persons may make the Claims.

1. Fines

See Stat. de modo levandi fines: *which saith* Quia fines in curia nostra levati, finem litibus debent imponere et imponunt, et ideò *fines* vocantur.

1. Fines are as ancient as any Court of Record and at the Common Law, they bind all strangers but those which have defect, which Entry or Claim not within a year by 17 *E.* 1. So Non-claim, after the year and day, was peremptory upon a Fine or Recovery in a Writ of Right Executory and not Executed, as is a Fine *sur Conusans de droit*, 7 *E.* 3. 335. Because transmutation of Possession gave occasion to a stranger to take notice, and to bring his Action or enter within the year and day after Recovery in Right, to be tryed by Battle or great Assise barred a stranger, if he had not defect as Nonage was for the great notice of it, because publick and more notorious then in other actions: And a Proclamation shall be made before Judgement upon a Recovery in right, by default for to give notice of it: And from thence use is derived to make Proclamation in formedon, as it is in 7 *H.* 4. 19. upon the confessing of the action, and so Fines after Recovery in a Writ of Right was of the greatest force, for it is called (by *Brown*,) *finis legis et fructus legis, exitus legis et effectus legis.*

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2. But the avoyding of a Fine by one, defeats it against all, although their Right was bound before by their Nonclaim, which sets at large all other Rights above them, although they make not claim within the year and day. 16 *E.* 2. As if the Lord defeats a Fine at the Common Law by deceit, he restoreth the right to him which Levies the Fine. And if the state which passes by the Fine be defeated, the right Paramount is restored; although it was barred before by Nonclaim. As the Feoffee is made upon condition, the Feoffee levies a Fine, one year passeth by the Heir without entry or challenge there he is barred by Nonclaim: but if the Abator enters upon the condition broken, the Heir now shall

H. 16. E. 2.

shall have *Mort, d' Auncestor* against him; and after the *Statute* of 4 *H.* 7. an action brought within five years shall defeat the Fine against himself, and all others having Right Paramount, although he hath not Judgement and Execution until seven years after Proclamation. Claim is defined by *Dyer*, to be a Challenge of the Ownership or Property, that he hath not in Possession, but is detained from him by wrong. There are four Claims for defeating of Fine; whereof two are by Record, (*viz*) Action Recall, and Entry of the Claim at the foot of the Fines; and two by Acts in the Country, (*viz*) by Actuall Entry and by Claim, and so notwithstanding, the Puissance of Fines at the Common Law, the Law hath provided those Claims for to preserve the Antient right. 359.

Claimes when to be made, and by whom, and when

3. Those which are strangers to the Fine, and have present right, ought to make Claim, and shall avail all in Remainder or Reversion, & their Nonclaim binds all in Remainder and Reversion, because all of them have but one year by the common Law after the Fine levied: And such mischief was a great cause why the *Statute* of 34 *E.* 3. *ca.* 16. (which outs Nonclaims) was made. But before this time, *W.* 2. *cap.* 1. 13 *E.* 1. hath provided for the Doner and Donee, that Nonclaim shall not bind them, as it did before 13 *E.* 1. as it is like. But an Infant was not bound at a time certain to make Claim by the Common Law: And it is proved by Implication of the *Statute* of *W.* 2. *cap.* 1. and 18 *E.* 1. *de modo levandi fines* (which observe in their Exposition) because he hath not discretion to consider of his right, nor to conceive what Action he shall bring, nor when, or how to Enter, or Claim, or to do Acts which require intelligence; and, in the same degree are Non-sane, a man in prison, and beyond

Sea

360. But a woman Covert was bound to make Claim by the Common Law, becauſe ſhe is not mentioned in any of the Acts, and hath a Husband which may make Claim for her. And therefore Infants and ſuch, are at large always, and bound to no time for to make their Claim by the Common-Law. And if the Father Diſſeiſee dyeth within a year and dye after the Fine Levied; before the *Statute* of Nonclaim, his Heir within age, he need not make Claim, becauſe he is not bound where the right diſcends to him more then he is when he hath a preſent right when the Fine was levied: nor Infant in Remainder or Reverſion, is not bound by the Nonclaim of the particular Tenant. And ſo howbeit that Fines at the Common Law were of ſo great force, yet the former right was conſidered, and time given for to preſerve it, and Infants were exempt out for this time. And after, when Nonclaim was repealed and outed in Fines and to make their Claims, and becauſe the Law was unreaſonable that thoſe in Remainder or Reverſion ſhould be bound by Nonclaim of particular Tenants; and the Law of Nonclaim being outed in proceſs of time, Fines became too feeble, and were in effect but Feoffments of Record, whereby the ſecurity of Inheritance was taken away, which was cauſe of great Contention between Subjects; and therefore the *Statute* of 4 *H.* 7. intended to reform three things;

35 E. 3. *cap.* 16.

Firſt, to magnifie Fines againe, and augment their validity.

Secondly, to preſerve the Ancient Right, if it be purſued within a certain time.

Thirdly,

Thirdly, of not binding of persons of defect, (or feme Coverts) unlesse they are also parties to the Fines; but favored those which had defects till their impediment removed, and then gave them time sufficient to pursue their right.

That which is excepted out of the Act, is out 361.
the provision of the Act, and there is no Ordi-
nance for it: but is so apparently exempted out of
the Act, as if no Act had ever been made. As
Feoffment of a Mannor except an Acre, or of
Lands in Dale except White-Acre, is voyd for
those Acres, as if no Feoffment had been made,
but a saving goes to them touched and not ex-
cept.

The word [*having*] in the *Statute* of Fines 4 *H.*7. 362.
shall be expounded of them which have right at the
time of the Fine Levied, and Proclamations made,
and also of the using of the Action or Claim, &c.
and not only at the time of the Action or Entry:
for the exception goes not but to those before
named; and the ampleness of the Exception is mea-
sured by the ampleneſſe of the Purview. And there-
fore *Stowell*, if he is bound by the Purview, he is af-
terwards excepted, and if he is not bound by the
Purview, he needs not to be excepted, and so he
is at large and out of the body of the Act, which
consists of the Purview and of the Exception.
Acts of Parliament are positive Laws, consisting
of Letter and Sense, which together make the 363.
Law. And the Common Law is ancient to all
positive Laws; and this is to be considered to
come to the sense of the positive Law, *viz.* to put
such sense to the Letter which excludes all mis-
chiefes and inconvenience. Those which Levie
Fines are parties, their Heirs are Privies, be-
cause there is privity of blood between them,

(strangers

(ſtrangers are they which are not Parties to the Fine nor privies:) And the Fine excludes not Privies by 4 *H.* 7. before not Parties here; and therefore it is no Myſtery, that the Letter of the Act will extend to them; it ſhall not be Laches until all the time is paſt: Becauſe they have Election to protract time, untill the laſt of the five years or laſt day; ſo that (they) within five years purſue which word (they) intends Heirs: and if ſo, then thoſe of full age, ſane memory, not covert, at large not in priſon, and within the realme; for ſuch ſenſe
364. ſtands beſt with equity and reaſon, which moſt avoids rigor and miſchief. Things within the Letter and yet out of the ſenſe and intent of *Statute*, as 3 *E.* 3. and 4 *H.* 7. 7. Doctor and Student, 148. An Infant named a Diſſeiſor, vouched a Record and failed, he ſhall not be impriſoned, Notwithſtanding *W.* 2. *cap.* 25. Nor an Infant Baily or Receiver found in arrerage of account ſhall not be committed to the next Goal, Notwithſtanding *W.* 2. *cap.* 1. Nor an Infant which is convict of Raviſhment of another Ward, ſhal not be impriſoned for the King's Fine, notwithſtanding *Morton*, Cap. 6. Nor if a woman Infant be Raviſhed, and conſent to the Raviſher, within twelve years, there the Heir ſhall not enter: notwithſtanding, *R.* 2. *cap.* 6. But Infants are bound by Laches for a Title, and favoured for the Inheritance, as Doctor and Student, 148. An Infant ſhall be bound by *Ceſſavit* or Waſte, becauſe an injury done by his Act, and he ſhall purchaſe and the Law will preſume, if he hath policy to get a thing, that he hath reaſon to defend himſelf; So if an Infant Lord enter not for Mortmain within the year, or before a Villain hath ſold, becauſe he hath but Title to the thing, that it was never in him. But Doctor and Student, 29. and 27. Aſſiſes, 3

Laches

bes of Entry upon Diſcent or Warranty, binds
an Infant, becauſe they have favour for Inhe-
ance, for Waiſe, Stray, Wreck, or for Goods taken
m them, and offered to Images, or taken by Ene-
es, and not retaken before the Sun ſets; or ſold
a Market Overt, or Acts as Executor, 35 *E.* 3. 45.
as King, or for neceſſity, as an Obligation for
at, and drink, (Doctor and Student. 104.) The
mmon Law is the foundation of this Act of 4 *H.* 7.
if the Father dies within a year after the Fine,
Heir Infant is at large, and the imperfections
ich may happen ſometimes within five years are
be conſidered, as thoſe which are at the time of
Fine or right then: And becauſe that the *Sta-*
provides for the Infant in the exception, and in
Fine, it will not be amiſs in the middeſt: And if
which hath a future right dies within five years,
Heir within age, ſhall have fine; *à fortiori* then
which hath a preſent right (as here) becauſe it is
greater eſtimation then a future. If a ſtranger
Fine becometh of Non-ſane memory, or is in pri-
the third year after Proclamations made, & after
five years becometh of Sane memory, or out
priſon, he ſhall not be concluded, becauſe he was
ſtrained and his acts were involuntary; but if he
he taketh Husband, or go beyond Sea in the
d year, and after five years is diſcovert, or with-
the Land, he ſhall be bound, becauſe theſe were
voluntary. An Expounder which adheres only
the Letter of the *Statute* of 4 *H.* 7. without ad-
reaſonable ſenſe, will admit many abſurdi-
by the Letter of the *Statute*; as if an Infant
ich hath preſent right and is excepted, dies with-
age, his Uncle being his Heir and of full age ſhal
ured. So if an Infant by Entry within age
old the Fine, & after full age, permit the Cenuſee

35 E. 3. *fol.* 45. vide ante, *fol.* 113.

365.

vide, Poſt *fol.* 372.

366.

to

to be for five years in poſſeſſion without Cl
he ſhall be barred by the Letter, which ſaith
he ſhall take Action or Entry within five years
ter full age. So an Infant being Diſſeiſee in
Mothers belly when the Fine was Levied, is
accepted by the Letter of the Act (becauſe his
is accounted from the time of his birth;) nor by
tent of the Act here; for ſome thing which is wi
in the intent of the makers of the Act, may not
within the Letter and intent alſo; and of thoſe
ceptions, the Letter binds none to five years af
full age, which were within age when the Fi
was Levied and ingroſſed, for many years may
between the one and the other; yet he that is bo
after the Fine levied, and is within age when it
ingroſſed, goeth not at large, but is bound to fi
years after full age, as well as he which was bo
an Infant when the fine was levied and ingroſſe
And if the Diſſeiſee at full age when the Fine
levied, die before all the Proclamations, his H
within age then, and during all the years, he
bound by the Letter, becauſe the Letter excep
him which hath right when the Fine is levie
But the intent of the Exception, intended to e
cept thoſe which had right, and are Infants wh
the five years commence; ſo it ſhall be if the D
ſeiſee becometh of Non-ſane Memory, or be in p
ſon before the Proclamations, and after five years
cometh to ſane-Memory, or forth of Priſon, he ſh
have five years after this by the intent of the E
ception.

367. Two Joint-Tenants are Diſſeiſe, the one wi
age, the Diſſeiſor levies a Fine, four years paſſe
ter the Proclamations, then he of full age dies,
Infant ſhall have other five years after his full
for all, by *Bendloes*, and ſeverall five years ſhall

severall Titles. As *A.* disseiseth a woman sole and after taketh her to Wife and they have Issue, *B.* is disseised and dies after a Fine levied by the disseisor, and before all the Proclamations made, the Issue being of full age, the Mother dies, the fifth year passes there, the Issue is bound as Heir to his Father, because in this respect, he hath but five years together. But as Heir to the Mother he shall have five years to be accounted from the death of the Father; for notwithstanding it is the self-same Land, he hath severall rights, the one the last right as Heir to his Father, and th'other the first right as Heir to his Mother, And in respect of them hath severall times; So the Husband maketh a Feoffment of the Land of his Wife, upon a condition which is broken, the Feoffee levies a Fine, the Husband dies in the fourth year after the Proclamations, having Issue by the Wife, and after the Wife dies, and five years passe; the Heir is barred to enter as Heir to the Father for the Condition, but he shall have five years from the death of his Father as Heir to his Mother for her right, for the cause aforesaid; by *Saunders*. *Ireland* and *Scotland* are severall Realms, But *Scotland* was holden of the Crown of *England*, and was within the Fee and Signiory of the Crown of *England*; and yet he which is in any of these two Realms shall be said to be out of the Realm, and shall be within the Exception of 4 *H.*7. Ideots, Lunaticks, and they which have the lethargy shall be comprehended in the words of Non memory, as well as Madmen.

Quando duo jura in una persona concurrunt, æquum est ac si esset in diversis. 368.

For *Zouch*: Peace which is the end of all Law described, and the necessity and benefit thereof; and those Laws which carrie most peace, are most estimable. And the *Statute* which Ousts

Nonclaim, was to the universall trouble of all the Realm; for the avoyding whereof, and to make Fines to have their ancient force, the Act of 4 H. 7. was made; and the Preamble of it is to be considered, because it is a Key to open the minds of the Makers of the Act, and the mischiefs that they intended to remedy: and the preamble shews that the Makers of the Act were of Opinion that Fines ought to be of greater force for to avoid contention, then they were before the *Statute* of Nonclaim, though now it is used to the contrary, *viz.* to the universall trouble of the Kings Subjects, and therefore they were Enemies to former rights, because that stirred up many Suits, and made the
370. Purview strongly against it; *Et lex si prospiciat majori parti, utilis est.* All Infants are bound by the generall Purview which containeth them in the Exceptions: As an Infant levies a Fine, Proclamations pass, he shall not have error, though within age, for no Infant is excepted: But he that is not Party to the Fine (by *Southcot* and *Walsh*) he is excepted out of the generall Purview, in the intent of the Makers of the Act. And (*Stowell*) the Heir is not within the Purview nor Exception of the *Statute*, for that he had not right at the time of the Fine levied; but then the right rested in his Ancestor which was disseised; for the Exception is always an exemption of that which is contained before in the generall words, otherwise it could not be an exception: As a Feoffment of a Mannor, except such an Acre which is not parcell of it; or, Lease of all Lands of the part of the Father, except Lands of the part of the Mother, is a void exception, because this exception was not in the Feoffment, nor Demise, or right, or not right, not the matter; but claim, or Nonclaim within

five years is the matter where a Fine is pleaded to conclude any. And this, Tried by iſſue by the one or the other, maketh an end of the matter.

Catline, a Writ of deceit by the Lord in ancient Demeaſne, made 20. years after Proclamation upon a Fine Levyed by his Tenant, ſhall make void the Fine, and the Tenant ſhall be reſtored to the Land, becauſe he claims not the land, but ſigniory, and ſervices out of the Land, and no right to the Land when the Fine was levyed, and therefore is out of the purview which extends not but to them that claim, or had right in poſſeſſion, Reverſion, or Remainder to the thing compriſed within the Fine, when the Fine was Levyed upon matter riſing before. The firſt ſaving is generall, and giveth five years after proclamation to thoſe which have right, and their Heirs, with a Condition annexed to it, *viz.* ſo that they purſue their Title, Claim, *&c.* within five years after Proclamations; and as the ſaving is general to all Heirs, notwithſtanding they have their imperfections of Nonage, Inſanity, *&c.* So is the Condition general, and extends to all Heirs whatſoever they are; and this was the cauſe of the Judgment; for otherwiſe the ſaving ſhall be for all heirs, and the [So] ſhall be of all Heirs within age, and then the [So] is not ſo large as the ſaving. And ſo the Heir within age is bound to the Condition of the firſt ſaving, as well as he is ſaved in the ſame, becauſe generall tranquillity is more favored then an Infant, and no time ſhall be gained by expoſition, or equity, beyond the words of the Act, where the Act as here, reſtrains all men to a time certain for the common tranquillity of the people; and Infants had been bound by the general purview of 32 *H.* 8. c. if they had not been excepted there; And there- 371.

fore if one of the Terms limited by 4 *H.* 7. be
1 Ma. c. 7, adjourned (becauſe the *Statute* ſaith, then next
Raſt. Fines enſuing) all the Proclamations before are void,
12. untill the *Statute* of 1 *Mar.* cap. 7. *Raſtall, Fines*, 12.
becauſe time limited by the act, ought to be purſu-
ed, and once attached in part, ought to be conti-
nued. So the fifth Counte upon Exigent ought
be the next to the fourth, or it is diſcontinuance,
and *Allocatus Comitatus* ſhall not aid; but is er-
ror. And therefore an Infant at the Common Law
vide ante, ſhall be bound to year and day, where by the *Sta-*
fol. 365. *tute* of 4 *H.* 7. The five years Commence in the
Father, being of full age; Nonclaim within the
time limited by the Common Law, ſhall loſe right,
and infancy there ſhall not aid the party, as 7 *H.* 6.
32. Nonclaim by the Lord of his villain by a year
and day, which hath fled into ancient Demeaſne.
7 *H.* 6. 32. So 15 *E.* 4. 6. Nonclaim of liberties before Juſtices
in Eire. So wood of another within a Forreſt of
the Kings and ſeiſed into the Kings hand, ſhall be
forfeited by Nonclaim within the year and day. So
if a Baſtard die ſeiſed, and Mulier claims not. So
2 *H.* 7. 10. one ſhall loſe his appeal of Murther if
he bringeth it not within the year and day. So by
272. the cuſtom of many Mannors, one ſhall loſe Copy-
ide ante. hold if he claims it not within a year and day after
ol. 57. the death of his anceſtor; *à fortiori*, then, time ſhall
H. 7. be peremptory where it is limited by the *Statute* for
ol. 10. the common repoſe of the Realm, which ſhall be
more favored then the private profit of any ſingle
perſon, be he Infant, of *none ſane memory*, &c. By *Ca-*
rus and *Dier*, the right of a Mulier within age, is
bound by diſcent of the baſtard, becauſe the
Law in this caſe is a binding Law, by *Southen*
and *Sanders* contrary, becauſe infancy ſhall ex-

cuſe

cuſe Laches of entry, 31. aſſ. 18. & 22. 36. aſſ. 2. & 33. E. 3.

The ſecond ſaving giveth new five years to other perſons, and here *Stowel* is the ſame perſon which had five years with his anceſtor by the firſt ſaving, becauſe the ſaving, and the [*ſo*] is in the Copulative, and the word [*others*] is excluſive of thoſe compriſed in the firſt ſaving, and the exception. And becauſe he is heir, and ſo within the firſt ſaving, he is excluded out of the ſecond ſaving by the word [*other*]. *Walſh* and *Catlin* held otherwiſe, if a Tenant for the life of another, the Remainder to *B.* for his life the Remainder to *A.* in Fee, is Diſſeiſed; the Diſſeiſor levies a Fine, and five years paſs after Proclamations, if he for whoſe life and the Remainder for life dies, he ſhall have new five years, becauſe it is another eſtate, and the firſt remains not to him; but by *Weſton* and *Catline* otherwiſe, becauſe not another perſon; alſo this right which firſt Diſcends to *Stowell* here, is not ſuch a right as the *Statute* intends to give new five years by the ſecond ſaving for a new right, for it was once right in the Anceſtor, and given to him before. And the word (Firſt) is of great purpoſe put into the Act, and this word (Firſt) being joyned as it ought to every of the words ſubſequent, *viz.* Accrue, Remain, Diſcend, or Come, excludes *Stowell* of the benefit of the ſecond ſaving, and 1 *R.* 2. *cap.* 7. touching Fines hath all words of 4 *H.* 7. touching the Purview and body of the Act, but the word (Firſt) which is added to 4 *H.* 7. as a thing thought very neceſſary, and ſo he that will take benefit of the ſecond ſaving, ought to prove four things, 1. That he is another perſon. Secondly, That the right firſt came to him. Thirdly, and that it came after the Fine ingroſſed, and Proclamations made. Fourthly, That his right

Lib. Aſſ. 3. Pl. 18. & 22. Aſſ. 36. H. 2.

is before the Fine levyed, as where right or Title shall first accrue. And therefore if the elder brother be possessed when the Father died seised, and the youngest is Disseised at the levying of the Fine with Proclamations, and five years passe, and after is deraigned, he shall be aided by the second saving for the cause aforesaid. So if the Disseisor of a Mortgagee levies a Fine with Proclamations, and five years passe, and after the Morgagor pay or tender the Money, he shall have five years after his payment or tender, because his Title first accrued after the Pro-
373. clamations by the payment or tender by matter before, *viz.* the condition; *Plowden* seems, that he is at large, and not bound to five years, because at the time of the Fine levied no wrong was done to him, nor to the estate which he claims. So a Husband levies a Fine with Proclamations, and after the five years past dies, and from thence by this second saving, his Wife shall have five years to sue out her Writ of Dower, for her Title accrued by the death of her Husband, upon cause before the Fine, *viz.* their inter-marriage, and seisin of her Husband, by *Plowden* she is at large and not bound to five years, because it was a real wrong done to her at the time of the Fine, or before, because her Title accrued after the Fine, *viz.* by the death of her Husband. So if Tenant cess one year before the Fine, and another year after the Proclamations, the Lord is at large to have his cessavit 20. years after, for it is not within the purview of the Act, because he had not Title at the time of the levying of the Fine; but it accrued afterwards, *viz.* at the end of the two years, where Land is given to the Father, and to his Heirs Females of his body (Remainder to his Son in Fee) Levy a Fine with Proclamations, and dies without Heir Female, then the Son shall have five years.

So

So Tenant for life, Remainder in Fee is Disseised, the Disseisor Levies a Fine, and five years passe, and Tenant for life dies, he in Remainder shall have new five years: Tenant for life, and Feoffee Levies a Fine, five years passe, entry for forfeiture is gone; but there by *Walsh* he shall have a Formedon after the death of the Tenant for life, if he sues it within five years, (by *Catline* otherwise) because his right accrues not first, or Remain after the death of the Tenant for life, because he might have entred before, and therefore is excluded from the benefit of the second saving. Tenant for years by *Statute*, or *Elegit*, is ousted, and a Fine with Proclamations levied, and five years pass; now none may enter, not he in Reversion, nor particular Tenant, neither shall they be aided by the second saving, for both might have entred before the Proclamations passe, because they all are comprised in the first saving; and therefore he in Reversion shall not have years after the Term ended, as he shall have where the particular estate was Free-hold, and a Termor is bound by this *Statute* of 4 *H.* 7. by the word (*Interest*) in the saving, which word may comprehend Term; And as to the word (it shall Discend) as by *Dier*; Discontinue of Tenant in Tail Levies a Fine with Proclamations, and five years pass; Tenant in Tail dies, the issue in Tail shall have five new years; but by him and *Catline*, if the Disseisor of Tenant in Tail Levy a Fine, *&c.* the issue is bound there for ever, because the right was present to the Tenant in Tail when the Fine was Levied, and he, and the Heirs in Tail are comprised within the first saving, and therefore barred, because they pursued not their right within five years according to the first saving; by *Southcot*, and *Weston* contrary; and by them every issue in Tail shall have a new five years; but by the said 374.

Chief Justice: the word (first) added (as it ought to be) to (it shall discend) will not admit every discent to have five years, the Remainder or Reversion in Tail upon an estate for life discends to his issue, there the issue shall have five years by the second saving after the death of Tenant for life, by *Weston*, and *Dier*; if the Son purchase, and dies, the Daughter enters and is Disseised, the Disseisor Levies a Fine, five years pass, the Son born after shall have new five years by the second saving, because it is he to whom the right first Discended after the Fine and Proclamations. So if the Feoffee of *Non sane memory* Levies a Fine, and dies, from thence his Heir shall have five years for the reason aforesaid; and as to the word (First) shall come, Tenant in Tail Levy a Fine, five years pass, and then dies without issue, from thence the Donor shall have five years for to bring his formedon in Revertor, because aided by the second saving, because it is him to whom the right first cometh after the Fine, and Proclamations; And in all those cases there is a new right or Title accrews, Discendes, remains or comes after the Proclamations, which was not in any other before, upon cause made before the fine; And disseisen here is no such cause which shall make *Stowel* to have such right, which was not in any other, but first in himself; and so it is not here, because the right was first in his Grand Father, which is saved in him and his heirs by the first saving, and therefore shall not be saved by the second: And the makers of the Act intended not to aide them by the second saving which were aided by the first, nor on the contrary. But to comprehend by the one saving those which were out of the other
375. saving, and therefore *Stowell* is not saved by the second saving, because he entred not by his own

right.

right, nor the right Discended, nor such matter before the Fine, that the makers of the Act intended; and he shall not be aided by equity, for no equity here, because universality is more regarded then particularity; one hath two defects as to present right, or when future right happeneth, all ought to be removed from him before the five years commence; and if it happeneth within a moneth after in any of the defects again, and so continue all the five years, or to the end of the first moneth of the five years, his heir dying within age before the five years Commence, they do proceed, and the Nonclaim within the five years shall bind the party, and his Heirs as well as if they had been void of all defects during all the five years, if they had no defects when the Fine was Levied; but if they had before the last Proclamation, and so continued, when all the Proclamations incurred, he shall not be bound to five years next after the last Proclamation, but shall have new five years after all defects removed, by *Plowden*. Successors shall not be bound, by 4 *H.* 7. by Fine, or negligence of their predecessor, as *Bendloes* would have it.

Sir Henry Nevil's *Case.*

THe Arch-Bishop of *Canterbury* Grants the Office of the keeping of a Park, with a Rent-charge of three pounds *per annum* for the exercising of it to Sir *Edward Nevil*, the Father, and Sir *Henry* the Son; and after Sir *Edward* the Father was attainted of Treason, and the Park, and the Mannor out of which the rent war Granted, comth to the King; and Sir *Henry* being Survivor, exhibites

378. P. 12. El. *in Exchequer upon a Petition.*

exhibites his Petition to the Exchequer for the Arrearages of the Rent incurred before, and to be paid the Rent from this time forward, and had Judgement according to his Petition in the Exchequer, without suing to the person of the Queen.

379. 1. If an Office of skill and confidence, which requires diligence and attendance, be granted to one for life, as the Custody of a Park, Stewardship, Bailywick, &c. he may not Grant this over, 21 E. 4. 20. nor forfeit this to the King for Felony nor Treason; otherwise it is if it be granted to one and his Heirs, in Fee, 1 H. 7. 28. there he may grant this over, because it is so intended by the generalty of the estate; but where it is granted for life onely, there no other is comprehended in the Grant, but the Grantee himself; so that he cannot make a Deputy without words, and therefore much less may he Grant this over; but if such Grantee for life be attainted of Felony or Treason, or imprisoned, or go over the Sea, or becomes of *Non compos mentis*, &c. so that the Grantor hath prejudice by his absence or default of attendance, this is a Forfeiture to the Grantor for the not doing or misdoing, notwithstanding that he be pardoned after, or the other defects removed; but if the Grantor hath not any prejudice by his absence, or default of attendance, the Grantee shall have the Office again after his Pardon, &c. but otherwise it it is of the Kings Grantee in such case; for the Office, Cesse, and the person of the Officer, was once discharged by the attainder, and the King may grant the Office to another, and he being the first Grantor, shall not be kept out by his Officer by such Grant, but otherwise it is in the case of a common person, for the Queen shall be unknown of her Officer by

21 E. 4. fol. 20. 8. 1 H. 7. fol. 28.

380.

such

Grant of the Kings, and then the con-
nce, and other causes of the first Grant
be broken by it, which would be incon-
ient.

2. If one Office of skill and confidence 184.
Granted to two for their lives, and
one is Attainted of Treason, this is 381
a Forfeiture of the Office. but that
other shall keep it presently and the Fee
.

But admitting that the King shall have it
ing his life which is Convicted of Trea-
, yet after his death the Survivor shall
it Adjudged; but if the King Grant such
ice to two, and the one committeth Felo-
or Treason, there the King shall have the
ire Office by Forfeiture, for that it shall
extinct in him; and goes by way of dis-
rge, and is a thing entire; but in the
er case it is but a Transmutation from one
the other, and the one shall not prejudice
other for his Free-hold.

3. The King shall have an Office of
ice of an estate of inheritance by For-
ure, for that he may Grant this over,
ough that he himself cannot use it;
otherwise it is of an estate for life, 1 H.
28.

The Fee here shall not be Forfeited,
that the Office shall not be Forfeit to
, to whom it is appropriated; for the
ce is appropriate to the person, and the
to the Office; and so the Office and
are Concommitant, as Estovers to be
ed in such a house, or Common granted
in

in such a place to one for his Cattle *Levant* and *Couchant* in his farm of *D.* are made a
5 H. 7. fol. 7. purtenant; and Estovers cannot be severed fr
the house, 5 *H.* 7. 7. Nor the Common fr
26 H. 8. fol. 4. the Farm, except by extinguishment, *H.* 8. 4. Annuity *pro consilio impendend* because it is a thing by reason of the p son.

Annuity granted by reason of an Office, Determinable with the Office, and contin with the Office as an incident, and insepa ble, yet the estate in the Annuity is one the other in the Office, 7 *E.* 4. *fol.* 22. if
7 E. 4. fol. 22. vide ante, fol. 116. Annuity *pro consilio*, &c. be Granted to t and the one of them be attainted, the ot shall have the Annuity, because it cannot Forfeited.

Empsons Case, if the King Grants the Of of Sheriff to two; and one of them is Atta ed, the entire Office is Forfeited, and Survivor shall not have any thing, bec the *Patent*, and the Office were an en thing, and not to be severed; And though King cannot be such an Officer, yet he s have it as he can, *viz.* from the extingui ment of the Pattent, and making of a n Officer.

Th

The Earl of Leicester's Case.

The Earl of *Leicester* was indicted before eight, upon a Commission awarded to after a new Commission was awarded to Major of *London* and others, to send for indictment taken before the 15. whereas in it was taken before eight of those onely, thereupon arraign the said Earl; and more- the second Commission recites, That he indicted before the said 15. of divers Trea-, and expresse none in certain, and *ex causa* and *causis*, to proceed against him ac- ing to the Law, whereupon he was arraigned, condemned thereupon accordingly; and af- the said attainder was confirmed by Act of Par- ent, which receites the said attainder, and con- it, and besides ordains, That the said at- ed persons, shall be attainted of high Trea- &c. And the attainder upon the indictment, the confirmation by Parliament, were adjudged d.

390. 15. Tr. 13. El. in K. B. Tr. *against* Haydon.

. For that the Indictment taken before 15, or an Indictment taken before; eight for the r number will not include the greater, but contrary; and there may be two Indict- s, one taken before 15. and the other be- eight, and for that the number is expreſt, e is certainty what Indictment the Queen ded for misprision of time, place, and num-

ber

ber, shall make the thing void, when they limited for certainty, and take away incert ty, as of the time of 7 *E.* 3. 26. one br a Writ, and Recites that it is containe the Articles, made in the time of King *ward*, Father of the King *Edward* the Th that no Sheriffe should put into Inquests, and declare over according to the *Statute*, the Writ was abated by Award, for that Articles, that is to say, *Articuli super Cha cap.* 9. was made in the time of *Edward* First, and not in the time of King *Edward* Second, which was Father to King *Edward* Third. So 18 *E.* 3. 25. a Statute Merch was made to pay, 16 *E.* 3. and the party Execution and the Writ supposed the summe be paid, 14 *E.* 3. and by the suite the fee was ousted, and sued his Writ of Erro the Kings Bench; (for the Kings Bench, cause it is the highest Court, shall reverse rour upon suits in the Chancery, according the order of the Common Law.) So a de sance which recites a Statute to be made Tenth day of *May*, where it was the fi is void, because time certain, and that which Acts are referred is materiall, bec there may be two *Statutes*, the one the fi the other the tenth day. Misprision of place, as 38 *H.* 6. 34. one pleads Letters P tents dated at *Westminster*, where it did b date at another place, Naught; because place is materiall, and is circumstance and nesse of verity and certainty. So by C mission to arraign one upon an Indictment *Dale* in the County of C. where he was Ind

18 *E.* 3. *fol.* 25.

393.

at another place in the same County, there not be arraigned by this authority, for reason aforesaid. Misprision of number, as Assises *placit.* 7. Writ of Re-disseisen shall Lib.Ass.23. ate, becaufe the Sheriffe took with him but pl. 5. e Coroner, where *Merton*, *cap.* 3. appoints o at the leaft. So in a *Precipe* there ought be twelve Summoners. So 8 *H.* 7. *pla. ul-ma*, the number limited by the Act; 3 *H.* 7. . 1. concerning the Star-Chamber ought to obſerved: So an accountant found in arrea-ges, ſhall not be committed to Priſon, if ere be not two Auditors, becaufe *W.* 2. *cap.* . ſaith, *auditorum*. So 2 *E.* 3. 8. A Writ 2 E. 3. 8. Attaint ſuppoſed that the Verdict paſſed be- Ass. *pl.* 5. e 4. Juſtices, and the Record proves that it s but before 2. there is no Warrant to take is Attaint. But 31 *E.* 3. in the Book of Lib. Ass. ſes, *pl.* 1. a *Procedendo*, ſuppoſed that the 31 E. 3. ſe was arraigned before 2. where it was be- *pl.* 1. e 3. good, becaufe no falſity there, becaufe greater comprehends the leſſe, not on the trary.

2. By *Anderſon* which was of Counſell for Defendant, and which in part confeſſed t the arraignment was not duly made; yet d, that it was not void, but voidable: See ere the Office of Juſtices for Treaſon, and eir Authority for Judgement given, where e due circumſtances of Law are not obſerved, not avoid, but voidable by Error; as 7 *E.* 3. 11 *H.* 7. 4. and 2 *Mar.* 1. Judgement en upon a Plea of Land. 21 *H.* 6. and 21: 4. 4. and 62. where a Fine levied without iginall, is voidable by Error, and by him, and

and *Lovelace*, this Writ of Error is taken
395. way here, becauſe a thing defeaſable con-
firmed by Parliament, is made indefeaſa-
ble,

The Counſell of the Earle to the contrar
clearly, that the Authority given to th
Mayor, and the others by the ſecond Com
miſſion, is to proceed upon one Indictment
and he proceeds upon another, and ſo ex
ceeds his Authority, and therefore ſhall b
void: Alſo they are no Juſtices of th
Treaſon, but of the Indictment and th
Treaſon expreſſed in it; And there is not a
ny ſuch Indictment, and no Treaſon in cer
tain is expreſſed in their Commiſſion: Bu
the Relation is generall to Treaſons con
tained in the Indictment, where in truth
there is not any ſuch Indictment, and ſo
the relation of a thing incertain in it ſelf
vide ante, to a thing which is not done; the thin
fol. 69. referred is void, (otherwiſe it is of a thin
certain) A Leaſe of all his Land in *D.* which
vide ante, he hath by his Mother, where 2 *E.* 4. 27
fol. 191. releaſes all his right in them, and hath n
Land there by the Mother, but by purcha
with his Father, this Leaſe and Releaſe ar
void for the cauſe aforeſaid: But otherwiſe it i
where he leaſes and releaſeth all his right i
White-acre in Dale, which he hath by hi
393. Mother, or hath by his Father, or by Pur
chaſe, becauſe the ſaving there which he ha
by his Mother is ſurpluſage, becauſe it was cer
tain enough before; all the parts of the Com
miſſion ſhall be conſidered together, and ful
filled as of every other Deed. As a man mak

ssment with a letter of Attorney to deliver sei-
en, if the Attorney will enter and take the profits
r a month or two, this is not well, for though he
ay enter, yet he must performe the last part also,
hich is to deliver over the possession present-
y. So here because they have authority to
raigne the Plaintiffe upon the Indictment, on-
taken before fifteen, and he was arraigned
Indictment before eight of them, all is
oid, and *Coram non Judice*, And it is not
mblable to the Cases put by *Anderson*, be-
ause there they have authority upon the Cause,
nd the Cause was within the Jurisdiction of the
ourt, and the Order is misused, in which
ase the Acts shall not be void, but voidable:
ut where one is assigned to do one thing,
nd he doth another, (as here,) this other
meerly void, and without Authority; as 9 *E.*
. by *Cooke*, He who Arbitrates another thing
an is committed to him, makes such Arbitre-
ent void.

Anderson, and *Lovelace* for the Defendant,
e Plaintiff shall be taken by this *Statute*, to
attainted, or at least concluded to say o-
erwise, because the recitall of the Act is an
stoppell to all; because every Subject is par-
, and privy to an Act of Parliament, and
Statute shall not be void to all intents:
nd the Expounder ought not to make Ex-
sition for to confound the Text, by 27 *H.* 8.
10. A woman may refuse her Joincture, if
signed after Marriage, implies that if it
re assigned before Marriage, that she shall
refuse, 9 *H.* 6. 9. Recitall of an Inden-

ture of defeasans, concludes the party to deny the Deed.

397. By the Counsell of the Plaintiff, the Act of Parliament cannot enure as a Confirmation of an Attainder, and as a new Attainder also, (for then a man shall be twice convict of one Crime which shall be superfluous); yet 1 *H.* 5. 5. One attainted of Felony may be arraigned of Treason, because it is a higher 1 H. 5. 5. offence, and shall forfeit Lands of whomsoever holden, if the Treason is committed before the Felony; but where offences are equall he shall not be twice attainted, for one Deed shall not be a Confirmation and Grant of one and the same thing. As the King recites by his Letters Patents, that he hath made *J.* a Denison, or hath manumissed him being his villain, and confirms it: and besides grants that he shall be a Denison or Free, all this is but a confirmation, because the King's Patents shall not enure to two intents, and therefore cannot plead the second Patent for his Legitimation, or Manumission; but the first Patent: so 9 *H.* 7. 2. and 7 *H.* 7. 14. The King grants Land by his Letters Patents, and reciting them, confirmes the Estate of the Patentee by the second Letters Patents, by vide ante, authority of Parliament; and saith further *fol.* 156. that he gives and grants the same Land to the Patentee; he shall plead the second by way of Confirmation, because the Land passes by the first Patent, not by the second, if it doth not shew that the Land came again

Kings hands after the first Pattent: But
if the King grants Pasture for two Oxen in his
Land, and by the second Pattent reciting
his first Grant, confirmes it; and moreover
giveth and granteth Pasture for two Oxen
to the first Grantee, there it shall enure as
a Grant, and confirmation also: And the
Grantee shall have Pasture for four Oxen,
because they are severall things which are
mentioned in the Confirmation, and in the
Grant. And in the other Cases before, it
is one same thing mentioned in both, and
not severall: Also the *Statute* recites none
but persons there recited to be attainted, 398.
but the Plaintiff was not attainted before,
nor the reasons aforesaid; therefore he is
not attainted by the *Statute*, as the King
recites by name, that such and such were
Burgesses of *L.* and grants to the Burgesses
before named to be quit of Toll, *&c.*
they will take the benefit of it, they
ought to averre who is Burgesse of *L.* And
the Plaintiff be attainted by Act also,
and the Defendant will plead this, so then
his plea shall be double, because he hath
pleaded an attainder by the Common Law,
and also by the Statute. But here it is
not double, because it is not a new at-
tainder, but a Confirmation: And because he
cannot plead the Confirmation without the
thing that was Confirmed. Also the Recitall
and Confirmation by the Statute is not taken,
nec pro ut: And also the recitall being false,
shall be intended to be upon Information:

And therefore an averment lies againſt this recitall.

So a Licenſe to alien Lands holden of the King, *ut dicitur*, there he which hath the Licence is not Eſtopped, to ſay that it is holden of another than the King, becauſe the Tenure in *Capite* is not preciſely affirmed, but *ut dicitur*, which taketh away all abſolute affirmance, 29 *Aſſ.* 38. Alſo the *Statute* referrs to an Attainder had before: And ſo to a thing which is not *in rei veritate*, for the cauſe aforeſaid; and therefore ſhall be void; but if the thing was before, and wanteth force and effect, then this ſhall be made good by the *Statute*, and there the Act is good, and hath power as to the thing, 29 *E.* 3. 24. *Grants*, *Fitzh.* 100. The King reciting an Attainder by Parliament of one *Mattravers*, by his Charter of Pardon reverſeth the ſame, and reſtores him, and after this, all is recited in another Parliament, and Confirmed by the ſame Parliament, and good for the Cauſe aforeſaid: So 38 *H.* 6. 33. Parliament confirmes the firſt Letters Patents, this enures according to the Effect and Purport of the firſt grant, and ſhall not take away the Condition, if any ſuch be: the King gives Land to *J.* S. the Parliament Confirmes, its a good grant: And ſo when the Parliament Confirmes a thing which is defective, it ſhall give power to it, if it be Confirmed: (as here the Act ſhall be void to all purpoſes, as 5 *E.* 4. 40. and 41.

P. 29. E. 3. fol. 24.

399.

Cuſtomes what.

If one Village hath Cuſtomes which is a gainſt

inſt the Law, and Reaſon, and no o-
hers, and the Parliament Confirmes their
uſtomes, it is void becauſe they had not
uſtomes, for things uſed meerly againſt the
aw and Reaſon are not Cuſtomes, not-
ithſtanding ſuch uſage. And if the branch
f one Act recites another Act, be it in
he Commencement, or Continuance, it is
oid, as 1 *E.* 6. c. 12. repeales all offences
ade Felony after the Commencement of the
igne of *H.* 8. and by one branch in it,
is Statute excepts imbeſſelling of goods by
ervants, made Felony in the ſeven and
wentieth yeare of *H.* 8. commencing the
urth of *February*, and continuing untill the
4. of *April*, whereas it finiſhed the four-
enth of *April*, and ſo Statutes which miſre-
te things, and are referred to them, ſhould
e void and conclude no man. And ſo here
he Statute which recites that the Plain-
ff was attainted, and confirmes it, where-
indeed he was not attainted, ſhall be
id,

Coles

Coles *Case.*

13 *Eli.* 401. IF one gives to another a mortall wound, whereof he languisheth, the 12th. of *February*, and the Queen by a generall Pardon by Parliament, Pardon all misdemeanors, *&c.* the 20. day of *February*, and after the party dies. Now this murther is Pardoned; Adjudged for that the wound was a Misdemeanor, and the cause of death, and then by consequence all that which ensueth the Cause is also pardoned.

The end of the first Book.

The Second Book.

Newis *and his Wife*, *against* Larke *and others.*

A Man deviſes his Lands to his eldeſt Son in tayle, Remainder to his youngeſt Son in tayle, Remainder to the heirs of his body, the Remainder over in Fee, and moreover his Will was, that if any of his entaylees, do wrong, vex, or moleſt any other of them, for the ſaid Lands; or ſhould Mortgage, bargaine, and ſell, *&c.* the ſaid lands, or otherwiſe incumber it, other then to Leaſe it to them, that from thenceforth every ſuch perſon and his heirs that ſhall ſo do, ſhall be excluded and diſſeiſed, touching the ſaid intaile; and that the conveyance of the intaile of the ſaid Lands, againſt him or them, ſhall be of no force: But that it ſhall deſcend and come to the party next in tayl to him, as if ſuch diſorderous perſons had never been mentioned in the ſaid Teſtament. And after the eldeſt Son levies a Fine, and after he and the youngeſt Brother ſuffer a common Recovery, and their Siſter enters; and by the Court her entry is lawfull: But the Writ was abated for that it was *Coram Juſticiis predictis*, whereas there were no Juſtices named before. M. 13. & 14. El. *in the Common Pleas.*

1. That the Fine and Recovery are ſuch acts, bargaines, and incombrances which make a forfeiture.

2. The penalty here inflicted for the forfeiture is a limitation which determines the eſtate, *Ipſo facto*, without making any diſcontinuance thereof

by the Alienation, and is not a condition by the intent of the Teſtator; and hereby the determination of the eſtate the Fee and Frank-tenement is caſt upon him in the next remainder (that ſhall not alien) without Entrie, as upon an Eſcheat, or dying without iſſue, and hath the intent as if it were deviſed, untill he ſhall alien.

The entry of *Scholaſtica* the Wife of *Newis* (because *I.* and *F. C.* her brothers, levied a Fine and ſuffered a common Recovery) by the Court is lawfull: (But the Writ was abated, for that it was *coram Juſtic' predic.* Where no Juſtices were named before,) becauſe the Fine and Recovery are ſuch Acts, Bargains, and Incumbrances, which make a forfeiture; for that they give title and occaſion to defeat the eſtates taile limitted, to *I.* and *F. C.* For by the Fine with Proclamations, the eſtate of *I.* is barrable, and by the Recovery, the Tail of him and *F.* is defeated, and ſo within the words, and the intent of the penalty of the laſt Will of their Father *H. C.* Alſo the penalty here inflicted for the forfeiture, is not a condition by the intent of the Teſtator, which will not that all the eſtates Taile ſhall be defeated for entry for the condition broke by him in poſſeſſion, or that any in remainder ſhall defeat all eſtates, and put him which enters into ſuch an eſtate as he had before the condition made, as 29 Aſſ. *pl.* 7. *Brook* Conditions inwards in a Will like unto a condition, ſhall not make a Condition becauſe the intent of the party appears not to be to defeat all the ſtate (*ſcilicet*) of him in remainder there; alſo it is not a condition here, becauſe the he breaks it which enters for the condition: But this is a limitation which determines the eſtate *Ipſo facto*, without making any diſcontinuance of by the alienation, and hereby the determination

410.

29 L. Aſſ. *pl.* 17.

411.

estate, the Fee and Franck Tenement is cast up- 413.
on him in the next remainder (which aliened not)
without entry, as upon an Escheator dying without
heir, and hath the intent as was devised *quousq*, he
shall alien or incumber. So land given to *I.* in tail,
so long as *I. S.* hath issue of his body, which dieth
without issue, there it shall revest presently without
entrie, for words named in a Will, if they are not
apt, shall be drawn to the intent, and the Law sub-
mits it self to the Will. First, As to an act of Par-
liament, as *Dyer* termed it in matter, order, and
form: So a gift of Land so long as such a one is Ab-
bot, or during coverture, is a limitation: So *Matri-
monii prolocuti*, there the estate shall be defeated by
the intent without expresse Condition in Deed,
Fitzh. natur. brev. 201. *E.* A man devises land Fitz. n. B.
to his Wife in *London*, upon condition that if she 210. E.
marry, the land shall remain to his Son in taile,
with remainder over; the woman marries;
The Husband occupies the Land, he in remainder
dies without heir of his body, the right heir of the
Donor shall have a speciall writ of *et gravi querelâ*
to help him, but hereby it appeares, it must be by
vote, and not by entry for non-performance of the
condition: So it shall be taken as a limitation, yet
it sounds as a Condition. And by *Dyer* a condition
in deed, in a conveyance made. By *Fitz. James*
28 H. 8. was taken by limitation, *à fortiori*, then
where it is by last Will, where the intent shall rule
the words, and the words not the intent, and the
intent shall be observed in the exposition of Wills,
and of the Testator in making of his Will, hath a
Power like to an Act of Parliament, by *Dier*, and the
intent in a devise shall make Estates passe contrary
to the Rules of the common Law in Deeds or other
gifts, as a Remainder is good without an Estate pre-
cedent

cedent. So where the particular Tenant entails
H. 34. E. 3. disagrees; so 34 *E.* 3. where it depends upon condition; so upon a deviſe to the ſon, after the death of his Wife, there ſhe takes an eſtate for life, although it be not given to her; ſo 10 *H.* 7. 20. *Ceſtui que uſe*, deviſes that a woman his Executrix ſhall ſell the land, ſhe ſells it to her ſecond Husband, and adjudged a good ſale. So a deviſe to a man and his heirs males which hath iſſue, a daughter, who hath iſſue a ſonne, he ſhall inherit (28 *H.* 8.) although the Lord *Dyer* held otherwiſe.

Bracebridge *against* Cooke.

418. Tr. 14. El. *in the Kings Bench in* E. *Firme.*

LEſſee for yeares grant his terme to the Wife of the Leſſor, and a ſtranger; the Wife dies, the ſtranger ſhall have the whole terme and land by *ſurvivor*. Adjudged.

1. For that the intereſt of the Husband by reaſon of the coverture ſevers not the Joincture, nor alters the poſſeſſion of the terme or other chattels reals of the Wife, but is poſſeſſed of them in the right of his Wife; ſo that if a ſtranger ours them, the Wife ought to joyn with the Husband in *Ej. firme*, and ſhe ſhall have judgement as well as the Husband; and therefore if the Husband charges it, or if he deviſe the terme and dies, the deviſe is void, becauſe he had not the Eſtate in him at the time, and before the time of his death: But otherwiſe it is of Chattels perſonall for the property of Chattels perſonall is deveſted out of the Wife and veſts in the Husband onely becauſe of the coverture; and therefore if one gives goods to a Feme covert and a ſtranger, the joyncture is pre-

ently severed by the Law, and the Husband and stranger shall be Tenants in common pre-

2. The immediate Fee and frank Tenement that the Husband hath in his own right, will not drown the terme which he hath in the right of his Wife where she is sole Lessee, or the moity of the terme where she is joynt Lessee, as here, and the operation of the Law shall not do a thing contrary to equity and reason to the prejudice of another, namely, in Chattels Reals, which are things of continuance, because the Husband by expresse act, hath not given nor altered it as he may by making of a Feoffment of the land, or new Lease, &c. But hath left it to the judgment of the Law. The Law preserves the estate of the Wife, which estate as to the Wife is disjoint from the Freehold and Fee-simple; but a rent granted to the tert-tenant and a stranger, the Tenant dies, the other shall not have all, because the Moity of the rent was drowned in the land, and therefore that that was not in joynture at the time of the death of him which first died, the other shall not have all as survivor: But the rent here shall be apportioned, because of the occupation that every one hath *per my et tout* of the profits. But Husband and Wife here cannot joyn in *E: firme* with the stranger: But the Husband shall use his reall action upon an Ouster during the coverture, because by this he continues all his estate, but that part of the estate taken from him by the disseisin by the *Ejectione Firme*: And the stranger may have *Ejectione Firme* for his Moity (as two Joyntenants for life, and to the heires of one of them looses by default, the one shall 419.

ſhall have a Writ of right, and the other a *Quod deforceat*) and the Moity of the terme is not ſuſpended, for then it ſhall not ſurvive. Parſon, Patron, and Ordinary, make a Leaſe for years of Glebe-land, the Parſon dies, the Leſſee is made Parſon and dyes, his Executors ſhall not have the reſidue of the terme, becauſe the terme was extinct by the freehold of the Land, which the Parſon had in him, as *Catline* held, becauſe both in his own right, and to his own uſe; yet in ſeverall capacities; But by *Dier* it ſhall not be extinct, becauſe he hath the term in his own right, and in Capacity of his naturall body, and the Inheritance as Parſon, which is another Capacity: But where the Leſſor hath the terme of years, as Executor to the Leſſee, it is not extinct; but the terme when the Leſſor dyes ſhall be revived.

Bracebridge *against* Clouſe.

420. Trin. terme. 17. Eliz. in Banco Regis.

A Man ſeized in Fee of a Mannor, maketh a Leaſe of forty Acres, parcell of the Mannor for forty years, if the Leſſee ſhall live ſo long; and after by Poll makes a Leaſe of the ſaid forty Acres to *J. S.* for ſeventy years: *J. S.* grants his terme to the Wife of the Leſſor, and a ſtranger; the Husband makes a Feoffment in fee by Indenture, of the Mannor, and moreover grants by the ſame Indenture all his other Lands and Tenements in the ſame Village to the Feoffee and his heirs, and this Feoffment was to the uſe of the Feoffer and his heirs, and dyed, and ſhortly after his Wife dies, the firſt Leſſee for years dyed within the forty years, the ſtranger entred into the whole forty Acres, and upon an Ouſter by the heire of the Leſſor brought *Ei. Firmes*

And

adjudged that he shall recover for his own
ity, and shall be barred for the moity of the
ce.

1. That the Lease for seventy years is good for so 421.
ny years which are to come of it after the death
the first Lessee, although it be without Deed
r that the Lessor in respect of his Reversion in
, may contract with another for any estate to be
ved out of the Reversion) and shall take effect
en, and not stay untill the forty years are extinct
effluxion of time; for the Condition, if he shall
e so long, is a limitation which determines the
ate, otherwise it is of a Collaterall Condition, for
though that the terme be finished by it, or by sur-
nder or forfeiture; the second terme shall not
mmence untill the terme be incurred, for that he
d not power to contract for the possession during
e first terme, in respect of any such possibility of
e breach of Condition, surrender, forfeiture, &c.
upon a Lease for life, for the incertainty of the
termination of the estate by his death, and for the
ssibility which was at the time of the Contract, 422
hat the Lease shall be executed before the death
Tenant for life by his surrender, forfeiture, &c.
the Lessor maketh a Lease for life, and after
keth a Lease to another for one and twenty years
commence presently; if Tenant for life dies, or
renders, the second Lease shall commence pre-
ly: But if one make a Lease the first of *May* for
ty years, by word defeasible upon Condition to
performed by the Lessor, and incontinently, that
o say the second day of *May*, makes a new Lease
forty years by word, this is void; for that the
Lease is avoided by performance of the Condi-
n, or is surrendered because there is no possibili-
that it will be executed, in respect of the Colla-

terall

terall Condition: But if the ſecond Leaſe be by I
denture it is good by Eſtoppell: And if it be
Deed Poll with Attornement, the Reverſion wi
paſſe.

2. By the firſt Leaſe of forty years, the for
Acres were ſevered from the Mannor for a time, fo
that the Leaſe was executed by entry, but the R
verſion and Franck-tenement continueth parcell
the Mannor; but the Leaſe for ſeventy yeares no
nor may be executed by entry during the firſt Leaſ
but is executory after this determined: So then
this Leaſe for ſeventy years the Leſſor hath not a
Reverſion; and then this is not ſevered from th
Mannor, but continues parcell of it, becauſe it
executory, and not executed by entry, and the
when the Leſſor maketh a Feoffment of the Man
nor, the Reverſion which depends upon the Lea
for forty yeares, paſſes as parcell of the Mannor
which Reverſion may, being parcell of a thing
poſſeſſion (but not contrary) diſcharge the moi
of the terme for ſeventy yeares, which is extinct b
the Livery that gave the poſſeſſion; otherwiſe
were, if the terme had been executed at the tim
of the Livery, except the Husband made Live
in this Land leaſed, for the Land is ſevered by th
leaſe, and here the execution of the poſſeſſion to th
uſe in an inſtant ſhall not revive the terme, whic
Littl. cap. de releaſes was extinct before by the Livery: Leſſee for yeare
before entry hath not poſſeſſion, ſo that a Releaſ
to him before entry is not good, but he hath onel
an Intereſt and right, which is grantable or for
feitable before entry; the Leſſor ſhall not hav
Rent untill he hath waved the poſſeſſion, or th
Leſſee enters, becauſe preſently the Leſſor is ad
28 H. 8. fol. 14. judged occupier, 28 *H.* 8. 14.

3. Th

The grant of all his Lands and Tenements
ll passe the terme, because it is his Land for the
e, and for that he had not any other Land there,
otherwise the words would be void; and there- 424.
the opinion of *Brook* was denyed to be Law,
6. which is contrary: but if he had other 7 E. 6.
ds there, then it may be that the terme will
passe.

He had Judgement for one Moity, and was
ed for the other, where he demanded the
ole, which is not good by *Plowden*, but should
e been barred for all (if exception had been ta-
to it) for that he might have had a better Writ
the Moity.

Vernon against Manners.

Hallenge of the Array, because the Sheriff 426.
which made it is Cosen to the Tenant in the M. 14. &
h degree. Adjudged good if he can shew how 15. El. in
is Cosen though never so farr removed, 21 E. 4. *Kings*
And notwithstanding the Tenant be seized in *Bench.*
ht of his Wife, to whom the Sheriff is not M. 21. E. 4.
eritable; for by reason of Cosenage, it shall *fol.* 75.
intended favourable, and although that
cannot inherite the Land demanded, yet
may inherite other Land, as heire to the
ant.

Smith

Smith *against* Stapleton.

P. 15. El. *in the Kings Bench. Replevin.*

LEase for life to Husband and Wife, Remainde in tayle to N. T. their Son, a ſtranger levies Fine, *Sur Conuſans de droit come ceo que il ad de ſo done al.* N. T. the Son, which grants and render the Land to him for fifty four years, rendring Rent hath iſſue and dyes before any Proclamations made and after the Proclamations paſſe, and after th Husband and Wife dies; Adjudged that the Lea is good againſt the iſſue of N. in tayle, by reaſon o the Rent, otherwiſe [illegible] if the Rent had no been reſerved.

Firſt, The Leaſe had not been voyd againſt N T. the Father himſelf if he had ſurvived the Hus band and Wife, if it were by words, notwithſtand ing it be a preſent contract, becauſe it depends up on an eſtate for life, which is uncertain when it ſha determine; otherwiſe it is, if the firſt had been Leaſe for years which contain a certainty, there th ſecond Leaſe ſhall be void for the firſt terme exce that it be by Deed poll (with Attournment) which caſe it ſhall enure by way of a grant of th Reverſion, if the party will uſe it ſo, or by Inden ture or Fine, which are matters of Eſtoppell.

Secondly, The Leaſe is but voidable againſt th iſſue, becauſe of the Rent which is a recompence otherwiſe it is of a charge, for it ſhall be void by th Remitter: and inaſmuch as this contingent Leaſe not avoided, but continues during the Proclama ons, the Statute of 32 *H.* 8. maketh this a barr a gainſt the iſſue during the terme.

431. Thirdly, A Leaſe by word made by the Husban and Wife, is the Leaſe of the Husband onely, a

of the Wife; poſſeſſion without title is ſufficient to make an Advowry for dammage feaſant, protection pleaded for part, and *Inter alia*, good by the Rule of the Court. A Fine pleaded by way, *De talis Concordia facta fuit*, and not that he levied a fine; and alſo pleaded that it was acknowledged in the Kings Court, without ſaying it was in the Common pleas, is good: and 22 *H.* 6. 13. A Fine is a record, although it be not ingroſſed, and ſhall be executed. M. 22. H. 6. fol. 12.

Fourthly, How, and in what degree this Leaſe ſhall paſſe at the beginning by the Fine.

The eſtate of *N.* not altered by the Fine of a ſtranger which had not any right or Eſtate in the Land; but is Eſtopped for his life to ſay otherwiſe, but that he receives fee ſimple by the Fine, 43 E.

There are ſeverall kinds of Leaſes, as Leaſes by word, by Deed Poll, by Indenture, and theſe are to be conſidered how they ſhall enure: As if a Leaſe be made by words, without Deed of Lands by one that hath fee ſimple for one and twenty years to commence preſently, rendring a rent, and after the ſame day maketh a new Leaſe by Paroll to another for the ſame terme, or for a leſſer terme, the ſecond Leaſe is void, although that the firſt Leſſee ſurrenders or forfeits; becauſe at the time of the firſt Leaſe he hath not but a Reverſion and no intereſt in him to contract for the poſſeſſion: And he that will by contract make another poſſeſſor of the thing, ought to be proprietor of the ſame himſelf: As if one ſells a Horſe upon condition that the Vendee ſhall pay him forty ſhillings at *Eaſter*, and after he ſells the Horſe to a ſtranger, and after the firſt Vendee payes not the forty ſhillings at *Eaſter*, and the Vendor reſeiſeth the Horſe, the ſecond Vendee ſhall not have the Horſe, becauſe the Vendor had him not at the

time of the sale; for the Condition only inable him not to contract for the property and possession which he then had not; but if the Lessee for one and twenty years be, and the Lessor the same day grant the Reversion by Deed for twenty one years to commence presently, there it is good with attournment and he shall have the Reversion during the first Lease, and the Rent as incident thereunto because it is another thing then the possession: So a Lease by word for years to commence after the first year, is good, because it is of another thing then the first Lessee had, because the second Lessee is to have the possession after the first possession and interest expired. A man leases for one and twenty years in possession, and presently makes a Lease of it for one and thirty years by word, this is good for the last ten years, and Executory for it, for a Lease for years is Executory, and severall for every year and day, and is as to execution as severall contracts. And therefore such contract may be good in part and void in part. So if he Leases for 21. years, to commence 10. years after, and he maketh a Lease
433. for 31. yeares to commence presently, it is good for the first 10. years, and void for the last 21. years for that he had contracted before and was certain although that the first Lease were forfeited or surrendred: otherwise it is, if the first Lease had been incertain, as a Lease for life; there the second Lease had been good after the Tenants life, not during his life although he surrendred or forfeited, unless it had been by Fine or Indenture; because Estoppels, if the second Lease for the same years be by Deed Poll, there the reversion with the rent, passe by Attornment by the demise of the land by the name of Land; if the possession cannot

Reve

reversion upon an Estate for life, passeth by bargaine and sale of the land by Deed inrolled) and the Grantee may use his Deed as he pleaseth; and therefore may use it as a Grant of a Reversion with attornment, otherwise it is, if it be by word, because the Reversion for years cannot be granted by word. But if Lessee for years will use a Lease Poll as a present Lease where he hath not attornment the Lease is void, although the first surrendred or forfeited as it is if it were by word, because a contract by Deed Poll passeth not that which another then enjoyes.

But if the second Lease were by Fine or Indenture, and the first surrendred or forfeited it is good; or if one leases land to me which he hath not at the time by Fine or Indenture, and after purchase it, or it descends to him, I may enter and occupy by Estoppell, and I shall be compelled by Estoppell to pay the Rent, because every one is concluded for that the land passeth in possession for fourty five years by Estoppell, and shall be good in estate to have the other years, because they are not inserted in the life time of the Tenants for life: for if the Lease for fourty five years had been by word, and the particular Tenant for life had died, the Lessee should have it against the Lessor. 434. Littl. *in his chap. of tenant for terme of yeares.*

If the estate given by the Fine is defeated, the Fine shall be void, although the Proclamations be after: for the Fine is the Principall, and the Proclamations but accessary to the Fine; as Tenant in taile disseised, levies a Fine to the disseisor: *Sur conusans de droit*, or *sur release* and dies, there the issue if he enters before all the Proclamations are passed, is remitted and is not

barred, for that 32 *H.* 8. which saith that Fines after Proclamations bars tayle, intends of Fines remaining in force untill after the Proclamations, that then it shall barr tayl, because otherwise the Proclamations are in vain for to give notice of the Fine, if the party cannot defeat the Fine before all the Proclamations ended, by Entrie, Claim, or Action. Tenant in tayle of land grants a Rent, by the render of a Fine, or grant the nomination of an 435. Advowson by the Render or Tenant in tayle of a Rent disseises the Tenant of the land, and levies a Fine of the land, and Proclamations passe; this is no barr to the issue, because the Fine was not levied of the thing, intayled by *Thorneton*: but if Tenant in tayle of a Rent, Advowson, Tithes, Common, *&c.* levies a Fine and dies, and after the Proclamations passe, the issue is barred by the Statute, yet the Fine was not a discontinuance, because things which lie in grant, but there he may claim (where entrie lieth not,) and good for to defeat the Fine and Proclamations, and to save the tayle: but if Proclamations passe, a *Formedon* deper dirg, the issue is barred by this Statute of 32 *H.* 8. otherwise it is, if one brings an Action within five years upon the Statute of 4 *H.* 7. and the five years incur hanging the action, because 32 *H.* 8. favours not estates tayle, and is stricter against them, then 4 *H.* 7. against a stranger, because 4 *H.* 7. allowes benefit to a stranger to persue his Action within five years 32 *H.* 8. before the Proclamations incurred, not without recovery also. Lease executory granted by the render of a Fine by tenant in tayle, shall be good against his issue after Proclamations incurred after the death of the Father. If a man makes Lease for 16. years or for life to one, and presently maketh a Lease for one and twenty yeares of the

another by Indenture or by Fine, rendring Rent, the Leſſor ſhall have an Action of debt for the Rent, by reaſon of the Eſtoppell for every one is Eſtopped againſt the other, to ſay that the poſſeſſion paſſeth not; but if the ſecond Leſſee enters and be expulſed by the firſt Leſſee he may well plead this matter in Bar, againſt the Leſſor in an action of debt. And ſo rent by Eſtoppell is avoyded by entry and expulſion. Tenant in tayl maketh a Leaſe for fourty years to commence ten years after rendring Rent, and the next day dies, the iſſue enters and infeoffs *I. S.* within the ten years, and after the ten years the Feoffee waves the poſſeſſion, and Leſſee enters, and payes the Rent to the Feoffee, which accepts it: Now he hath made the Leaſe good, for by the Feoffment the Leaſe was not avoided; becauſe it was an Act indifferent and Eligible, and he could not make his Election before his time, and then this Election affirms or diſaffirms avoidable Leaſe; And if one entry of the iſſue avoids not a Leaſe executory, *A fortiori*, a deſcent of the Remainder where entry fails, ſhall not avoid it; but a rent charge he ſhall, becauſe there the iſſue hath not *Quid pro quo*, and to his diſadvantage, the entry of the iſſue and Feoffment over-diſchargeth the Rent-charge, granted by his Father, 14 *Aſſ. pl.* 4. So one Statute, 9 *E.* 3. contrary, but no Law by *Plowden* and *Bromley*, for that the Remitter diſchargeth the Execution as well as the Rent-charge. Trees ſold by Tenant in tayl, and not ſevered in his life, the bargainee ſhall not have them 18 *E.* 4. 436. 438.

If the Plaintiff prayes not the Prothonotary to enter his judgement nor pay for it, the judgement ſhall not be entered without the order of Court.

Davies *against* Pepys.

P. 15. El. *in the Common Pleas, Debt.* 440. Mag. Chart. *cap.* 8. H. 21. E. 3. *fol.* 9.

THe obligee may charge the Heire or Executor at his Election where they both have assets, but not doubly; for if he be satisfied by the one, the other shall be discharged by *Audita querela*.

The King untill 33 *H.* 8. could not touch the Land or Heire of his debtor, if he had goods sufficient, by *Magna Charta*; *cap.* 8. but other persons were left at large, Advowson and other Lands were extended for this debt: Debt upon an Obligation against one as Heire in the *debet & detinet*, adjudged good; otherwise it is against Executors, for Executors are debtors, and have their assets in one anothers right, (*scilicet*) in the right of the said Testator, but the Heire hath the Land to him discended in his own right, and so the property which he hath in the assets maketh the debt his proper debt. And therefore if he dies, his Executors shall be charged with the debt of his Father, and not his Heire, notwithstanding he hath the Land by discent for that he claimes it from his Father, and not from his Grand-father which was debtor, as it seemeth by the Book of entrys, *fol.* 171. title Debt. Yet inquire by *Plowden*: And if the Heire come not in and confesse the action and the truth of the Assets discended, then he shall be charged as for his own debt, by *Capias ad satisfaciendum*, *fieri facias*, or *elegit*: So if he be condemned upon default, *nihil dicit*, false plea, or demurrer, as *Greensmiths* Case is 15 *El.* or upon *nihil dicit*, as *Killegrewes* Case is, 3 *Eliz.* or upon any other Plea, or not pleading, *&c.* otherwise of Execu-

tor

ors which are debtors: but in anothers right, there Execution ſhall be of the goods of the deceaſed onely, and not of their proper goods, and in debt againſt the Heire, all the Land which he hath by diſcent ſhall be put in execution by the Common Law, and in no other Caſe. 441.

Cleer *againſt* Brook.

IF a man purchaſe Lands, and die without Iſſue and without Heire on the part of his Father, the Heire of the Mother of his Father ſhall inherit him, and not the Heire on the part of his own Father. Adjudged. For the Heire on the part of the Grand-Mother on the part of his Father (which conveys by the Father which is a Male) is more worthy of blood then the Heire on the part of the Mother, of the Purchaſor which conveys immediately by a Female, and not by a Male; But if both agree in equall dignity of blood; there the neereſt Heire ſhall be preferred, as the brother of the Grand Mother of the part of the Mother of the Purchaſor ſhall be preferred before the brother of the great Grand-Mother of the part of the Father; for he is neareſt, and the dignity of their blood as to the Purchaſor is equall, for Proximity keepeth place on the part of the Females conjoyned by marriage to the Males, from whence ſuch blood is once derived by a Male to the Purchaſor, and this was the opinion of the whole Court: Land purchaſed by the Father diſcends, never reſorting to the blood of the Mother of his Son, becauſe ſtrangers to the blood of the Father, 19 E. 3. 29. No woman after the Wife of the Father purchaſor, ſhall have the Land when 447. P. 15. El. *in the Common Pleas.* 445.

once diſcended, becauſe it ought to touch this blood alwayes. But then Heires of the Wife of the Father purchaſor ſhall have it, if others fail, becauſe Wives by the marriage after the purchaſe are of Alliance to the blood, and not of the blood of the Purchaſor, otherwiſe it is of marriage which precedes the Purchaſe. And ſo no marriage is to be regarded, but that of the Father and Mother of the Purchaſor, and no marriage after ſhall make a man inheritable to this Land. By the Court *Waſt* aſſigned in digging of Gravell, ſuffering Houſes to be uncovered, whereby the Timber rotted, and permitting a Wall of ſtone to fall to ruine, and a Meadow to lie continually overflowne, and covered with water.

Sir Thomas Wroth's *Caſe*.

454. Tr. 15. El. *in the Exchequer Petition.*

KIng *Henry* the eighth, granted an Annuity of 20l. to Sir *Thomas Wroth* for his life, to be Uſher of the Privy Chamber to the Prince *Edward* his Son, without the words, *Pro nobis hæredibus & ſucceſſoribus noſtris*; And dies, and after *E.* 6. dies. The queſtion was, if the Annuity ſhould be determined by it, or if, notwithſtanding it, the Annuity ſhall have his continuance. And it was adjudged that the Annuity continues during his own life, and he ſhall have the arrerages.

455. M. 21. E. 4. fol. 48. P. 26. H. 8. fol. 1.

1. If the King reciting a thing executed, which is not materiall, as for the good ſervice which he hath done, grants an Annuity, *&c.* there the party in pleading ſhall not need to make averment of it by 21 *E.* 4. 48. and 26 *H.* 8. 1. But otherwiſe it is if the thing be materiall and executory, as that he hath releaſed, there he ought to averre that he

hath

released it, which is in benefit of the King.

2. The not doing of the service here to the King, shall cesse the Annuity as well as if the service had been appointed to the grantor himself, as an Annuity granted by the King, to a Physitian, or Schoolmaster, for to give Physick or teach a Stranger, shall determine by not doing of it which is the use of the grant and executory as the Annuity it self is.

3. The discent of the Crowne and State Royall to the Prince, makes him King, and alters the degree of his Person, because another Majestie there, and requires Officers of greater Honour to do service to his politick body: And therefore by this Act of God, the Law discharges Sir *Thomas Wroth* from his service, and therefore without averment, that he had served King *Edward* all his life time, is not to purpose, otherwise if the service be feaseable to his naturall body onely, as Physick, Surgery, Musick, Grammer, &c. for the naturall body alters not by assumption of the Royall estate from its infirmities. 456.

4. That the death of the King *Henry* the 6. hath not determined the Annuity, although that the service is discharged by the death of the Person to whom it is to be done. For this discharge cometh by the Act of God, otherwise it were if by the Act of the Party, as if he had withdrawn himself from the Prince's service, when he was Prince. So of an Annuity granted for life, *pro consilio impendendo*, to the Grantee which dyeth, yet the Annuity remains; for otherwise it should be, and the annuity shall cesse by refusall of the Grantee for to give when he is required, because his default, and the Grantor hath

not

not meanes by Law to compell him to give or sell.

457. 3. The Grant of the Annuity is good, although that it wanteth these words (his Heirs and Successours) for that it is granted in the body Politick, and charges this body which never dies, but alwayes hath continuance; as a Grant of an Annuity or Obligation made by the Abbot and Covent, is good without this word successor, because the Corporation stands charged, which always continues, otherwise it is of a naturall body, for there the Heire shall not be charged (if he is not named nor hath assets) as by Obligation of his Father, grant of Annuity or warranty, because as the body naturall which grants is taken away by death

P. 2. E. 3. et T. 3. E. 3. fol. 29. so shall his charge be; if the King without these words (heires and successors) grants to one licence to Alien, and die, the Grantee cannot Alien in the time of another King, 2 E. 3. and 3 E. 3. 29. For

M. 2. H. 7. fol. 6. that it is a licence onely; otherwise of a licence which implyes an interest: as to an Abbot of Purchasor in *Mortmaine*, for there the King gives his Signiory upon the matter as it seemeth 2 H. 7. Inheritance of the King, or a thing in which he is intituled of Common right, as Lands, Conusans of Pleas out of the Kings Courts, or account by a Sheriff, shall not passe against the Heirs and Successors of the King without special words, Heirs, and Successors; as the grant of a County, *Absque compoto nobis reddendo*; yet he shall account to the Successor, because it is Executory, of Common right to the Crowne, otherwise of a thing newly created, or a grant which is executed presently in the party; yet the perception is Executory, as a grant of a Faire

Mar-

ket, Warren, *&c.* without these words, (Heires and successors) is good, and shall be held against the heires of the King and justification may be added to a *quo warranto.* Pension or Annuity granted by the King untill he be promoted (by us) these words (by us) are spoken in the politick body, by which the Heire may promote him, and then the pension is extinct by *Sanders*, chief Baron, who said, as *Plowden* reported, and it was resolved by the Judges of the Law, 1 *Mar.* that Patents without these words; *pro nobis hered. & successoribus nostris*, granted for the corporall exercise of an Office or service, are ordered to be good. 458. 459.

Eision *against* Studd.

A Woman Tenant in fee, taketh Husband, and the Husband and Wife levies a Fine *Sur Conusans de droit come ceo*; the Conusee grants and renders the Land to the Husband and Wife, and the heires of their bodyes, the remainder in fee to the right heires of the Wife, the Husband hath issue by the Wife and dyes; the Wife taketh a second Husband, and they leavy a Fine to their own uses, for the terme of their lives without impeachment of wast, the remainder to the Husband and his heires for sixty yeares, Remainder in tayle to their issue, the remainder in fee to the right heires of the Wife, and the issue of the first Husband enters for the forfeiture made by this second Fine, by the Statute of 11 *H.* 7. *cap.* 20. And adjudged no forfeiture; and yet is directly within the words but 463. P. 16. El. *in the Common Pleas, Ejectf. firme.*

not

not within the intent, for that the Joincture and advancement came not originally from the Husband, or any of his Anceſtors, to the Wife, but on the contrary from the Wife to the Husband; yet the Land ſhall be chargeable to Statures and Recogniſances which the Conuſee had acknowledged before, and to the dower of the Wife of the Conuſee which grants and renders it: But yet is not within the intent of the Statute, becauſe the advancement cometh not from the Husband nor his Anceſtors, and therefore to reſtraine Women to diſpoſe of their inheritance after the death of their Husbands, is contrary to the intent of the Statute, and the intent ought to be thought on (becauſe the *Purview*, extends not further then the intent of the makers of the Statute) as the Wife infeoffs the Father of him with whom ſhe intends to marry with a purpoſe that he ſhall regive the Land to them after their intermarriage for lives, or remainder in tayle to the Wife; the Father doth ſo, they have iſſue, the Wife after the death of the Husband levies a Fine to other uſes, their iſſue may not enter; yet it is within the words of the Act of 11 *H.* 7. becauſe the Father gave it to them. But this cometh from the Wife her ſelf by circumſtance: And the Father was but as an Inſtrument of it, and therefore out of the intent of 11 *H.* 7. which reſtraineth the generalty of the letter of the Statute, and maketh the Caſes within the words out of the penalty of the Statute, by the intent of the Makers: As Infants and mad men are excepted out of the Caſes of Felonies made by any Statute; ſo neither thoſe not a Feme covert ſhall be concluded in the intent of the Statute, which maketh them acceſſary, which ſhall give Meat, Drink, or other ayde to them which ſhall commit ſuch an Act. So if a bargaine for Land be made,

…, before a Writ brought against him and the …e depending, Livery and Seisen is made, it is … *Champarty*, 19 R. 2. because he ought to per- M. 19. R. 2.
…rme the bargaine made upon just consideration, …rwithstanding, *W.* 2. *cap.* 49. and *Artieul. super …art. cap.* 11. So a fee is within the letter, but not …e intent of the Statute of 23 *H.* 6. *cap.* 10. be- 23 H. 6.
…use appointed to the Sheriff in the beginning by *cap.* 10.
…e order and discretion of the Court for his labour …nd attendance, when the Prisoners are brought to …eir delivery, 21 *H.* 7. 16. So *Wreck* (if a Man, …Dog, or Cat, escapes alive,) shall be kept, that the …rty may have his goods, if he claimes within the …are, by *W.* 1. *cap.* 4. is intended of such things …hich will endure so long, and not perish in the …eane time, as are Lemans, Oranges, &c. So a rent …ranted by tenant in tayle for a release of right in …her Lands, is good, 44 *E.* 3. 21. because for the …nefit of the estate tayle; And *W.* 2. *De donis*, …*c.* intends not to restraine that which amends the …state tayle, So Parsonages and Vicarages are with- …n the words, but out of the sense and intent of 1 *E.* …*cap.* 14. which inlargeth the words of the Statute …nd maketh that Cases within the like mischief, …hall be within the Purview by equity; as by the …ook of entrys, *fol.* 406. a man shall recover dou- …le damages for costs sustained with force, by equi- …y of 4 *H.* 4. *cap.* 8. which gives this for disseisen …f the Land: So that Executor which cometh first …y distresse shall answer by equity of 9 *E.* 3. *cap.* 5. …hich speaketh of Executors: So by equity of *Glou-…ester*, the Lessor shall have wast against the Lessee Qui hæret
…half a yeare, or for twenty weeks, if he pleads in litera,
…ears. So 1 *E.* 6. *cap.* 12. which takes away Cler- hæret in
…y for stealing Horses, takes it away also for one cortice.
…orse, because included in the Plurall Number; and 467.
there-

466. T. 44. E. 3. fol. 21.

therefore *Plowden* disallows 2 *E.* 6. *cap.* 33. which taketh away Clergy for the stealing of one Horse, a superfluous Statute, and was made in vaine; And so 1 *E.* 6. speaks not of Law but morall verture which reformes the Law, and the other equity is *Quasi equality*, becaufe in the like reason, in the like Law.

Sobye *against* Molins.

470. H. 17. El. *in the Kings Bench. Attachment upon prohibition.*

TIthes shall be paid for the Boughs of Horne beame, Hasell, Sallows, Maple, and such Tree which are not fit for building, and so of the Tree themselves, although that the Trees and Bough are above the age of one and twenty yeares, for the are not great Trees which are exempted and privi ledged of Tithes, by the Statute of 45 *E.* 3. *cap.* or rather by the Common Law, in affirmance which this Statute was made, as appeareth, 50 *E.* 3. 10. But Tithes shall not be payd for Ashes, Oak and Elmes, Beech, and such like Trees which ar fit for building, and of the age of twenty years, no for the branches of them which are of the age o twenty yeares; *Quære*, if the Branches are within such age as the Timber Trees which use to be loppe and lopt if Tithe shall be payd for them; and it seemeth Tithes shall be paid of them by the Book.

H. 50. E. 3. *fol.* 10.

471. The use at this day is upon suggestion t have a prohibition, that the party shall be bound by Obligation, or Recognisance to the King, to preferr a Bill of attachment against the party which sues in the spiritual Court, if he requires it, and upon it to declare and joine issue, or demurr upon the righ

Tythes, and award consultation, which *Plowden* vicious: First, for that the Defendant is not of, and therefore may not have consultation upon such proceedings: Secondly, for that the Judgment upon the Attachment ought to be acquit or acquit the party of the Contempt, and not proceed on the right of Tythes: Thirdly, for that the Plaintiff cometh into the Court voluntarily (*Scilicet*, by his Recognisance) to exhibit his Attachment, where he ought to be brought in by Process: Fourthly, Because the suggestion of the Attachment false: Fifthly, For that if the Plaintiff will not proceed, the Defendant hath no remedy, but a Recognisance forfeited to the King, of which he shall have little benefit: But *Plowden* held it to be the best course after the prohibition, that the Defendant sues out a *Scire facias* against the Plaintiff, *Quare consultatio concedi non debeat*: And upon this the Plaintiff may declare, and the matter shall be tryed, and the Defendant may have consultation; and then he will be an Actor.

Regist. brev. fo. 71.

Sanders and *Archer's* Case.

Archer gave poison to *Sanders* to poison his Wife, and *Sanders* gives this to his wife in a roasted Apple, which did eat part of it, and gave the residue to their daughter, being an Infant, and after the Wife recovers, and the Infant dyes, and it was adjudged Murder in *Sanders*, for which he was hanged, but not in *Archer*, for he was acquit to be no way necessary to this Murder.

H. 8. El. *the Report of the opinions of* Dyer, *chief Justice*; *and* Barham, *Justices of Assisesin* First, Warw.

First, For that *Sanders* had an evil intent of Murder at the beginning of his Act to kill his Wife; and therefore the consequent of his Act by which the Daughter dyes, shall be adjudged according to the commencement; So if a man shootes at one, and kills another, or lyeth in waite to kill one, and kills another, this shall be Murther in him, otherwise it is where he hath no ill intent of killing any, as to lay poyson to kill Rats, and one eates of it and dyeth.

475. Secondly, The consent of *Archer* to kill the Woman, may not be conjectured further then he gave it; and therefore shall not extend to the death of the Daughter which is another distinct Act; Otherwise it is, if one had followed the other in one person: As if I command you to rob *J. S.* and he resists, and you kill him. So if I command you to beat him, and he dies of the battery: So if I command you to burn the House of *J. S.* and you do it, and by that fire the House of *J. D.* is burnt, I am accessary to both, because the Commandement reacheth to all the sequell thereof, and is the cause of it; and therefore I shall be partaker of what ensues this ill Act commanded by me; otherwise it is if I command you to robb *J. S.* as he is going to *Sturbridge* Faire, and you rob his House in *Cheapside* for this is another manner of Fellony, and these are severall Acts: As if I command you to steale a white Horse, and you steal a bay Horse, or an Oxe or burne the House of *J.* whereas I commanded you to burne the House of *B.* there I am not accessary for that my assent is not lyable to it, because it is a thing distinct and contrary to my commandement directly: But if I command you to kill *J.* by Poyson, and you kill him by another meane or Instrument another day or place then I command, the

I am accessary, because the death is the principall matter, and the others onely the manner and forme, and the variance in the manner and forme of this Commandement discharges not me to be accessary: But if I countermand this before you kill him I am not accessary, for the mind of the accessary ought to continue to do evill at the time of the act done.

If one be pardoned of Murder, and the Wife of the dead sue an appeal, and a stranger receives him, and gives him Meat and Drink, knowing of the Murder and Pardon, he is accessary to the Fellony against the Wife, although that he is not against the King, because this Fellony is discharged against the King, but remaines as to the Wife, *per Catlin*: But *Popham* held otherwise, because that at the time of the receipt, there is not any offence continuing against the Crowne and Dignity of the King, for that he was pardoned before, and one cannot be accessary without offence to the Crowne. But *Plowden* held, that if the Goaler suffer him to escape after the Pardon, this is Fellony in him, because he suffers a Fellon to escape; for that he was in for Fellony, for he was detained in Prison at the suite of the Wife appellant. 47 6.

Nicholls *against* Nicholls.

THE Lord *Lovell*, 18 *E.* 4. Lease for life to *Thomas Wright*, and moreover grants that if he dyes without issue, that then the Lessee shall have fee: And the Lord was attainted of high Treason in Parliament, 1 *H.* 7. and all his Land forfeit to the King: saving to every stranger such right, title, M. 17. & 18. El. *in* tresp.

title, and interest, which they had, as if the Statute had not been ever made; and after the Lord dyed without issue, and in 11 *El.* an Office was found. The question was, whether the Lessee should have the Fee by the Condition and the Saving. And adjudged that he should have the Fee.

482. 1. That all the Fee Simple passeth not out of the Lord *Lovell*, but continues alwayes in him untill the Condition, which is precedent to the estate be performed. 14 *H.* 8. 17. *Wheelers case* 10 *Assi.* 15. 6. *R.* 2. *Plessingtons Case* and 12. *R.* 2. That Action shall be brought against Lessee for years upon condition to have Fee, and the Lessor together, and adjudged maintenable; for a Condition precedent shall have relation to the Livery for to avoid incumbrances for vesting the Fee which was at the time of the performance: Husband and Wife may

483. not take by Moities, though they shall vouch upon a Feoffment made to them before the Coverture, because that although they were sole when the Warrant was made, yet they were Covert when the Recovery was. So a Reversion is granted to a man and his Wife when they are sole, and when they have intermarried the tenant attornes to them, they have not distinct Moities, because then the Reversion settles in them, and respects not the grant made to them when sole; and so the time in which a thing vests is specially to be considered.

P. 14. H. 8. cap. 17.

2. That the estate in Fee appointed by the Condition, is not Reversion, because it commences at a day to come; nor a Remainder, because in its vesting it drowns the particular Estate; but shall enure by way of inlargement of his Estate upon the condition performed.

4. That

3. That the Freehold in Deed or in Law, (but a right or Title onely) is not vested in the King by the word (Forfeiture) in this Statute without an Office to find the certainty of the Land which the party attainted had; as in 4 E. 4. 22. the Lord *Hungerfords* Case, for then the Statute of 33 H. 8. *cap.* 20. which now giveth Actuall possession to the King, was not in being, for Treason without Office should be made in vaine and go to attainders, happning after this Statute of 33. not to those before as our Case is. And if one be attainted of Treason, the Freehold and Fee remaineth in him and shall not be in the King untill Office found by the course of the common Law; for if he hath capacity to take lands of new by new purchase, he shall retain the antient, and shall be Tenant to the *Precipe*; but when he dieth the Land cannot discend to his Heire, because the blood is corrupted but it shall Escheat to the Lord, if it be holden of a common person, or to the King in the nature of a common Escheat if it be holden of him, and not as an Escheat by Treason, untill Office by *Barham* and *Dier*. To the first Objection it was said, That the Condition performed which is a reall agreement shall divest the state in Fee out of any stranger which hath the Reversio without privity as by grant, Escheat, &c. For that the Land is charged with this agreement reall in whose hands soever it cometh, and therefore the Fee shall vest in the Lessee by the performance of the Condition discharged of all incumbrances made after the Condition, and the privity there is destroyed by the Act of the Lessor. So 6 *R.* 2. *Plessingtons* Case, where a man leases for years upon Condition to be performed to have Fee, after levies a Fine; the Lessee per- 486.

M. 4. E. 4. fol. 22.

performes the Condition, he shall have Fee of the Conusee; but by *Belknap* there he shall have the moneys which the Lessee by his Condition ought to pay: otherwise it is, if the privity be destroyed by the Act of the Lessee, as where the Lessee grants his Estate, there the Fee shall not vest in him nor his assignee.

vide ante, *fol.* 483. 487.

5. For answer to the second Objection, it was said that the Condition shall be saved by the words which shall extend to all Conditions, Rents, Profits, or other things out of, or in Land, and the saving of the right of him which hath not offended shall be taken beneficiall. By some, right is where a thing is taken away from another by wrong Title, as where a man hath cause to have the thing which another hath, and hath not action. Condition is a possibility to have Title. Action is a suite given by the Law. Interest is part of the Estate of the Land, as a Lease for yeares: or execution by Statute.

488. vide ante, *fol.* 484.

6. The answer to the third Objection, The Lessee ought not to shew in pleading that he is not excepted in the Statute, for that he gains not any new thing, but will retain the old; and also because the Statute is to his disadvantage, but that he shall take benefit of a Statute shewing it.

7. For answer to the fourth Objection, it was said, that admitting that the Fee here shall be forfeited to the King without Office, yet the Condition shall draw it out of him by a Petition, or *Monstrans de droit*, by some, but *Quere* thereof; for otherwise it shall not vest at the time of the death of the Lord *Lovell*, and if it vest not there, it shall not vest at all: for it is appointed to him; as if the Lessee here had entered into Religion, and the Lessor without being attainted, had died without issue,

after

after the Leſſee is deraigned he ſhall not have the fee, becauſe it may not veſt in him at the time of the Condition performed. So if he was diſſeiſed at that time; And ſo here for to avoid the inconvenience by the operation of the Law or former agreement, a thing ſhall be deveſted out of the King at the inſtant of the Condition performed without any ſuch circumſtance, As Tenant in Taile diſcontinues, the Diſcontinuee infeoffs the King by Deed inrolled, the King Leaſes to the Tenant in Taile for life, with the Remainder to his iſſue for life, the Leſſee dies, the iſſue is remitted by the remainder falling to him, and the Fee deveſts out of the King without any circumſtance. And ſo a Remitter ſhall defeat the Eſtate of the King, and an Office of the King ſhall defeat the Remitter, as 3 E. 4. 25. in the Earle of *Northumberlands* Caſe, by relation or if the Diſſeiſee enters after the Attainder of his Diſſeiſor poſſeſſion of the King by Office, ſhall not be removed without Petition; but if he enter before his Diſſeiſor be attainted, he ſhall be removed without Petition, becauſe the Title of the King there is more antient, and the Office ſhall have relation to the Attainder onely for the profits, although it relate to the time of the Treaſon for to avoid mean Acts and Incumbrances. So Tenant in *Capite* maketh a Leaſe for life rendring Rent with clauſe of Re-entry for not payment, and dies, his Heire within age enters for the Rent arere: An Office is found, the entry of the Heire for the Condition broken is avoided (by *Lovelace*) for the poſſeſſion of the Heire, by force of which he entered, is utterly defeated by Relation, which inures the King to the Grant.

vide ante. fol. 488. M. 3. E. 4. fol. 25.

And so the entry of the Heire for a thing not due to him, shall be adjudged *Tortio* by relation. So if Trespasse, 19 E. 4. 2. where for things coming of the Land, as Grasse, *&c.* Office avoids the punishment against those which do the wrong, and takes it away by relation of the Office (which intitles the King, because of the Escheat before the Trespasse.) But for the entry into the Land, or breaking his Fences, which ariseth not from the Revenue of the Land, the Action is not gone by the Office.

If an Office, *virtute commissionis*, be pleaded, he ought to shew the authority given by it, and the execution thereof accordingly; because persons appointed by Commission have not any other power then what is appointed to them by the Commission; otherwise it is of an Inquisition taken, *virtute Officii*, before the Escheator, Sheriff, Steward of a Leete, *&c.* for that their authority appeareth to the Court judicially, because it is known by the Law, for that they are Officers of the Common Law.

A Remainder ought to vest when it is appointed, otherwise it shall never vest. The Kings Pardon shall not excuse any man for the repairing of a Bridge which ought to do it, because it shall not take away the Interest that the Subjects take therein. So a man pledgeth a Jewell for ten pound and after is attainted, the King shall not have it without paying of the ten pound. So 13 *R.* 2. the Earle of *Kent* had return of certain Cattell in *Replegiari* and the Proprietor of them is attainted, the Earle shall keep them against the King, untill he be satisfied of the thing; because the Prerogative will not give any prejudice to another.

Ludford

Ludford *against* Gretton.

A Warrant to make Letters Patents, was directed by *H.* 8. to the Chancellor, which entered not the day of the Receit of the Warrant in the Kings Record according to the Purview of the Statute of 18 *H.* 6. *cap.* 1. And yet the Letters Patents made thereupon were adjudged good. For that the Purview of the Statute maketh Letters Patents void onely, for the variance between the date of the Patent, and the day of the entery of the Warrant, And the Court held three manner of Patents good upon the Statute.

M. 18. & 19. El. *in the Kings Bench, Trespasse.*

491.

1. If no Warrant be made at all, it is good by the Common Law, and not void by the Statute, because there is not any variance.

2. If there ibe a Warrant, and the day of the delivery of the Warrant be not entered, as in the Principall Case.

3. If the day of the delivery of the Warrant be entered, and the Patent dated after the day of the delivery, for this variance is out of the mischief of the Purview, which was in antedating of Patents before the delivery of the Warrant, and not after dating, and yet is within the words, but out of the intent of the Act.

Records shall have Relation to their date, and cannot be averred contrary to the date, nor to vary from it, because it tends to the discredit of an Officer of Record. Deeds relates to the Livery, and date in Deeds concludes not any to aver the contrary.

Grendon *against the Bishop of* Lincolne.

P. 19. El. *In the Common Pleas Quare Impedit.*

HENRY the eighth, being seised of an Advowson in the right of his Crown, presents *J. S.* and dies, *E. 6.* by his Letters Patents, grants the advowson to the Dean and Chapter of *L.* and their Successors in Fee; and also grants to them License and Liberty, *virtute authoritatis suæ Regiæ supremæ & Ecclesiæ qua fungimur*, that they shall retain the said Advowson, and all the Profits thereof for ever to their proper uses, whensoever the said Church shall become void. And after the death of the said Incumbent, the said King *E. 6.* presents his Clerk to the said Church, which was Admitted, Instituted, and Inducted; and adjudged no usurpation, which shall put the Dean and Chapter out of possession.

* If the Plaintiff alledge matter effectuall, as discent, &c. and the Defendant shew a matter in Law, which upon the Law discussed, proves the said matter alledged by Plaintiff, true or false, there he ought not to take a traverse, for then the Jury shall try this matter in Law, which properly belongeth to the Court to discusse, *Per Curiam.*

496. 1. Appropriation of an Advowson ought alwayes to be made to a body Politicke, or Corporation Spirituall, being Patron of the said Advowson, and such Parson onely is capable of an Appropriation, and no other; and by the Law such Parson or Parsonee may not grant over his Incumbency, no more then an Incumbent of a Parsonage presentable at this

this day, not any other shall have it, because it is appropriate to his Parson, 3 E. 3. 1. The Case of the Templers, that by their dissolution the Appropriation was dissolved; And yet was first ordained when such Parsons by incroachment and sufferance were made Parsons in Parsonees, which could not say Service, nor Administer the Sacraments, as Deane, and Chapter, Nuns, Abbotesses, &c. which was a thing horrible, by the Lord *Dyer*. S. 3. E. 3.

2. Every Approbation shall be made by the King, by the Patron, and by the ordinary. By the King, for the Lesse which he may have, or otherwise as King, by reason of the Tenure; And by the ordinary Supreme, or Inferiour for the interest that they ought to have in seeing the Cure served; And by the Patron to whom the Appropriation shall be made; and those three are Actors in the Play, as *Dyer* said: But here the Appropriation made by the King, which is also Supreame ordinary by the Statute of 25 *Hen.* 8. which transfers to him the Authority of the Pope, is good. As the Deane of Wells makes a resignation to the King, and it was adjudged good by the Court: because he is Supreme ordinary by the Statute of 25 *H.* 8. in Sir *John Pollards* Case against *Waldron*, and here the King doth three things. First, he grants the Advowson. Secondly, he maketh the Appropriation as Supreme Ordinary. Thirdly, he giveth his consent as King, if time of Lapse be devolved to the King, he shall present as Supreme Patron, in respect that the Advowson is holden of him mediately, or immediately. vide ante, fol. 593.

If the Appropriation be made without Licenſe of the King (be the Adowſon holden of him, or a common Parſon) the King ſhall ſeiſe the Adowſon, and ſhall have the Preſentments, until he be ſatisfied of the Fine by his Prerogative, and as in the name of a diſtreſs, 21. E. 3. 5. And there it is ſaid, That the Appropriation is not Mortmain, becauſe it is not any tranſmutation of the poſſeſſion, nor ſubſtraction of Services, but the Tenure remaineth, as it was before.

21. E. 3. f. 5. in *Quare impedit.*

500 3 The Appropriation may be made by words future, when the Church is full, although that the Incumbent hath the Fee and Inheritance of the Church, and none ſhall meddle with it, which is his in his life; but otherwiſe it is of preſent words, and the proper time to appropriate it, is, when the Church is void, becauſe then it may be executed preſently: But the Patron cannot preſent when it is full, by future words (*ſcilicet*) that he ſhall be incumbent, when the Church ſhall be void: For that he hath not Title to Preſent before the avoidance. If the King preſents to an Advowſon, & appropriate the Church to a Dean and Chapter, which maketh a Leaſe for years in the life of the Incumbent; this is a void Leaſe after the death of the Incumbent (by *Plowden*); for that at the time of the making of it, they had nothing in the Rectory, and the Appropriation was not executed, until after the avoydance.

501 4 An Uſurpation may not be upon a Parſon in Parſonee, for that he is perpetual incumbent, and two Incumbents cannot be in one Church, 38 *H.* 6. 24. 39 *H.* 6. 21. and 27. and there cannot be ouſter by wrong, nor have right of Adowſon, for he is not out of Poſſeſſion; and if one preſents to ſuch an Advowſon

38. H. 6. fo. 24.

rson Appropriate, and the Clerk is admitted, instituted, and inducted, by six months; yet the Church is not become Presentative, nor by any other *Act*, except onely where the Parson in Parliance himself presents; for there, *volenti non fit injuria*, (by *Manwood*, and *Dyer*) [the dissolution of the Corporation, to which the Advowson is appropriate, is a disappropriation of the Advowson; and the Lord of whom it is holden, may present. If a Dean and Chapter seised of a Mannor, to which an Advowson is Appendent, and the Church is appropriate to them, and after they make a Feoffment of the Mannor, with the Appurtenances, this disappropriates the Advowson; for by some it passeth as an Appendent to the Mannor, by the Common Law, because the Appropriation destroys not the Appendency: But now by the Statute which maketh lay-Persons capable of Parsonages Appropriate, they are severed from Mannors by the Intent of the *Act*, and by the grant of the Parsonage Appropriate, which now may be granted to a common Person, the Advowson shall pass.

Four Answers to the four Exceptions of the Plea.

First, The first exception is, because the Patent is not pleaded with a *Non obstante*, of the Statute of Mortmain, and therefore not good by *Dyer*.

But *Plowden* held the contrary; for that the Grant is good until Office found, and then he may well plead a License for that time; also the Patent

tent is *Ex certa scientia*, which countervails the clause of *Non obstante*, for that implies that the King was knowing of the Law; for ignorance indeed may be allowed in the King, ignorance in Law not: So if the King grant Lands to his Villain, the Land passeth untill Office; but it is no infranchisement, because if he was his Villain or not, is a forrain matter, and not apparent to the King. And the Kings Grant shall not enure to two intents, where one is forraign matter. The clause of *Non obstante*, is requisite in a Patent, to be Sheriff for life, 2 H. 7. because the Statute saith by precise words, That he shall not be Sheriff above one yeare. So a Parent to a Murtherer for pardon, and that he shall not find sureties, for his good behaviour ought to have a *Non obstante*, 10 E. 3. because this Statute avoided the Patent by precise words, without such surety; But the Statute of Mortmaine doth not so here, but giveth entry or seisure for a paine, admitting the Grant to be good.

2 H. 7. *intituled Grant*, pl. 33. *in* Fitzh.

The second exception was, that the Patent made not them Parson by expresse words by *Dyer*.

fo 3. The second exception was answered by *Plowden*, who said, because the words amounted to as much, and for that the Kings intent appeared to be so, that it should not be void, because *Ex gratia & mero motu*.

The third exception made by *Dyer*, was, that they did not plead that they entred.

But *Plowden* answered that, because the Patent granted them power to retain, *&c.* And also they pleaded that they were seised, which implies an entrie and in the Common Pleas, use upon possession executory

ary shall say seised onely, without saying, that 514.
tarred and was seised. H. 20. El.
The fourth exception that was made by *Dyer*, in the Kings
, for that they pleaded that they were seised of Bench.
Rectory of the Parsonage of the Deane, in the Fiefi firme.
t of their Cathedrall Church of *Worcester*,
ereas it should be in the right of the Church of
e Deane.
Plowden answered the fourth exception thus.
at they plead the seisen of all the intire
ng, otherwise if it were of parcell of it, or
gs pertaining to it, for there they should plead
t they were seised of it in the right of the Church
he Deane.
But Judgement was given for the Bishop.

Eare *against* Snow *and others.*

TEnant in taile and his Wife (which had no
thing in the Land) suffer a common Recovery
23 *Hen.* 8. to his owne use in Fee, the Husband
his Will in writing, deviseth the Land to *J. S.*
after the Statute of 27 *H.* 8. is made, and af-
that he publisheth his Testament of new, and
, the issue in taile enters, *J. S.* dies, his heire
thin age, the issue in taile dies, the heire of *J.*
enters upon the Son of the issue in taile: And
judged lawfull. And no Remitter, but that
estate taile shall be barred by the Recovery,
withstanding the overliving of the Wife,
the Wife was named onely to be barred of
dower, and forasmuch as she had not any
te nor no losse, she shall not recover any o-
e nor any recompence; and besides, the e-
recovered is an estate taile, as the est

lost was, to which the Wife was a stranger; and al-
515. though she shall have the recompence in value, ye
the Issue in tail might enter and out her, becaus
the loss is his, and not the Wifes, and he shall not b
estopped by conclusion of his Ancestors, by joyning
his wife in the Voucher, and besides it is uncertai
what estate the wife shall have in the recom
pence.

Welkden against Elkington.

519.
H. 20. El. in the Com-mon-Pleas. Trespass.

LEffee for years devise that his wife shall hav
and occupy the term for so many years as sh
shall live; and after her death he gave and be
queathed the residue of the said years of the sai
Lease, then not expired, to his Son, and his Assign
and made his said wife his sole Executrix, and dyed
the Wife entred, agreeing to the Legacy, and afte
aliened the term, and the alienee granted it agai
to the wife, and the wife died within the term; An
adjudged, that the Son, or his administrator, sha
have the residue of the term.

Assent to the particular estate, shall reach to a
Remainder also, but an assent to the Devise of
Rent shall not extend to the Devise of the term
and if the Devise is made of a Rent, or common o
of the term, and after of the Land it self; payme
of the Rent by the Executor, or his sufferance f
the Devisee to use the common, is not execution
the term, because the term is one thing, and th
profit out of it is another; but where four years
a term is devised to one, and the remainder to an
ther, there otherwise it is, because all is of one sa
thing.

Firſt, The Deviſe to the Wife for her life is not abſolute Deviſe of the intire Term, but conditionally, or upon limitation (if ſhe lives ſo long) for if ſhe dies, her Intereſt is determined by the limitation and deviſe to him for his life by implication (becauſe the reſidue of the term is deviſed to the Son after the death of the wife, in which is implyed that the wife ſhall have it for her life) and alſo determinable by the limitation as aboveſaid, and the Deviſe to the Son ſhall be expounded to precede the Deviſe of the wife, and ſo both ſhall ſtand.

Secondly, The Deviſe to the Wife and Son is of the ſame thing (*ſcilicet*) Of the Land it ſelf, and the Wife ſhall have the Collateral Occupation only of the Land by the Deviſe; but the very Intereſt and term of the Land ſhe ſhall have conditionally, and ſo two parties of one term, the one to the Wife, and the other to the Son, and then the Execution of the Deviſe to the Wife, ſhall be Execution of the Legacy to the Son. 524

Thirdly, The alienation of the Wife hath not defeated the Intereſt of the Son, which is accrued to him by the Condition or limitation, nor extinct the Condition or limitation, which ſhall tranſfer the Intereſt to him.

If Executor being legatory of a term by the Deviſe of the Teſtator enters generally, he is poſſeſſed as Executor, becauſe it is his firſt Title, until he maketh election to agree to the Deviſe. A Termor grants his term to one for life, the Grantee ſhall have the intereſt of the term by *Popham*, becauſe for life, is a greater eſtate than for years: But *Quere*, if he dies, if the eſtate be determined. As Leſſee for years grants a rent-charge to one for his life, he ſhall have the Rent during all the years, if he ſhall ſo long live, which

time

time of life includes all the years which is a life.
Vide Post. fol. 525. term: yet if he dies, the Rent shall be determine
(by *Plowden, fol. 525.*) and the Grantee hath but
Chattel in the Rent, for he may not have free-hol
out of a Chattel. Lessee for years grants all his term
which shall be arrear after his death, this is voi
for the uncertainty; for by the reservation of th
term for his life, he hath reserved all the term, an
therefore the Grant which is but one sentence with
out any *Habendum*, is void, 7. E. 6. (by devise good
otherwise if he had granted his term *habendum*, after
his death, there the Grant is good, and passeth the
term presently, and the *habendum* is void for the
521. Repugnancy: But *fol.* 156. it is void, 9. *H.* 58. A man
maketh a Lease for ten years, after maketh anothe
Lease for six, to commence the same day; the second
is void, and he shall not maintain an action of debt
against his Lessee, although the Lessee for ten years
surrender, because during the ten years he may not
contract with another, for a Lease to take effect du-
ring this time. Implication in a Devise, giveth an
N. 13. H. 7 f. 17. Estate for life to the Wife, 13. *H.* 7. 17. profit to be
taken out of the Land, is a distinct thing from the
Interest of the estate. Execution of an Occupation
of a thing, is not occupation of the propriety it self
as in a Devise of a Book to use, as 37. *H.* 6. 30. Con-
I. 37. H. 6. f. 30. dition or possibility goes in privity, and cannot be
limited to a stranger, *Circumlocution*, in a Devise, or
Lease, is equivalent to a direct Grant, as to have
long as one shall live, and during life, is all one. In
tent shall be observed in the Expasition of Wills
as if one deviseth his Land by the premises to one, and
after deviseth the Rent to another out of the same
Land, by the said Will, this is a good Devise of the
Rent first, and after of the Land in sense, and so by

Expo-

Expoſition the words ſhall be altered, and ſo marſhalled, that the intent may take effect: So a Termor deviſeth all his term to his Son, nevertheleſs his Will is, that his Wife ſhall have it for her life, holden a good Deviſe to both by converſion of the words. So a Remainder to the Church of Saint *Andrew* in *Holborn*, good by Deviſe, 21. *R.* 2. although the Deviſee is not capable, becauſe the Teſtator intended that the Parſon ſhall have it. *Ceſtui que uſe*, at this day deviſe, that his Feoffees ſhal be ſeiſed to the uſe of one *A.* in fee, this is a good Deviſe of the Land: Adjudged in the Caſe of *Lingen*: (yet after 27 *H.* 8. he cannot have Feoffees to his uſe, becauſe the intent was, that he ſhould have the Land). So the Executor ſhall not ſell the Land according to the Deviſe, but take the profits for two years to his own uſe, the Heir may enter, becauſe the intent of the Teſtator maketh this a Condition, 38. *Aſſ.* 31. 523. S. 21. R. 2.

Incertainty in Contracts reduceable to certainty by contingent, ſtandeth good: As if I leaſe to one *habendum*, from the death of J. until ſuch a Feaſt which ſhall be in the year, 1620. good, if J. dye before that, otherwiſe it is void. Two properties of a term, as where Leſſee for years, which grants over his term, enters for non payment of Rent, and retaineth until he be paid his Arrerages thereof: So of a Conuſee of a Statute, which hath the Land extended, ſo upon a Leaſe for years of a Mill, excepts the Profits to the Leſſor, for his life, and adjudged good Exception: And if the Leſſor enters, he hath a properry incertain, and the Leſſee another, 39 *H.* 6. 37. 8. So it is of Sheep letten for to compeſter, or Chain of Gold pledged, 5 *H.* 7. 1. they have one property, and the Owner another.

Cestuy que use devise the Profits and Issues of his Lands, *fol.* 509. *b.* (*Cestui que use*, before the Statute of 27 *H.* 8. Devise his Land, and after the Statute publishes his Testament of new, the Land passeth by the Statute of 32 *H.* 8. yet he was once countermanded by the Statute. *Cestuy que use*, devises that his Feoffees shall stand seized to the use of himself for life, with remainder over, this is a good Declaration of the use during his life, yet the Will cannot take effect untill his death.

vide ante *fol.* 514.

vide ante *fol.* 508.

Bransbie, *against* Grantham.

P. 20. El. *in the Kings Bench* E. firme.

AN Executor having a Terme, as Executor devises the Terme to a stranger, and maketh his Sonne Executor and dies, the stranger enters into the Land by the Assent and Consent of the Executor. And after the Executor enters: And adjudged that his Entry was lawfull, and the devise void:

516. And by consequence, the assent given to avoid the thing, shall be also void, and shall not enure as a new grant; but onely an assent to the thing devised.

1. Because that the Executor cannot devise any thing which he hath as Executor.

2. For that the Executor hath the Terme here to the use of the Testator, and no man can make a devise of any thing, except that he hath it to his own use: And therefore the Husband cannot devise the Terme of his Wife; And the

when the Executor dies, his Executor hath it by Title before the devise as Executor of the first Testator, and the property that the devisor had as Executor is determined by the determination of his Office of Executorship which is ended by his death; and the last Executor hath it by Relation as immediate Executor of the first Testator: (So an Executor cannot devise the goods of his Testator) and therefore the goods of the first Testator in the hands of the last Executor shall not be taken in execution for the debt of the last Testator, because the last Executor hath them as immediate Executor to the first Testator, and to his use, as if they never had been in the last Testator by Relation.

Hare *against* Bickly.

A Prebendary after Admission and Institution, and before Induction and Installation, grants an Annuity for him and his Successors: The Bishop confirms it, and after the Prebendary is Installed, & on the same day of the Installation, the Dean and Chapter confirmes also, and after the Prebendary dieth, and the Grantee bringeth a Writ of Annuity against the Successor of the Prebend; and Adjudged, that it lyeth not, because the Grant before Induction was void. 528 Tr. 20. El. *Annuity.*

Induction giveth to the Prebendary the possession Temporall, and Freehold, (and the Confirmation is nothing without the Possession:) And therefore without Induction, a man shall not have a Writ of Right nor Spoliation, Trespasse nor

26 H. 8. f. 3. Assise; otherwise it is, of a *Quare Impedit*. For in the first he alledges Esplees, but not in the last, 26 *H.* 8. 3. But by the Admission and Institution he hath care of Soules, and is inabled to administer the Sacraments, *&c.* And the Arch-Deacon shall make Induction to the Parson and Vicar, but shall not make Installation to a Prebendary, but the Deane and Chapter shall do it. No Plenarty against the King before Induction, for that it is corporall seisen and possession, 38 *E.* 3. 10. So the King confirmes to the Collatee of a Bishop before he is inducted, there the Confirmation is voide, 11 *H.* 4. 7. 1 *H.* 5. 1. He which hath the Nomination is Patron, and he that presents is his servant, Induction is triable by the Countrey. So if Parson or not, and it shall be tried where the Church is, 21 *E.* 4. 7. and 33. A woman recovers in Dower, she cannot enter, but ought to have seisen delivered to her by the Sheriff; as a Copyholder ought to be admitted by the Lord of the Mannor, if it discends to him, before he shall have seisen in Judgement of Law: So a Prebendary, Parson, or Vicar, before he is Inducted, or Installed, hath not seisen, nor is full Incumbent for to charge the Possession of the Prebend, Parsonage, or Vicaridge.

38 E. 3. f. 3. & 10. M. 11. H. 4. fol. 7. 529. 21 E. 4. fol. 7. & 33.

Croft *against* Howell.

Tr. 20. El. in the Kings Bench; Ej. firme.

THe Cookes of *London* were incorporated in 22 *E.* 4. by the name of two Masters and Governors of the Communality of the Mystery of the Cookes of *London*, and in the 21 *H.* 8. they bargain and sell certain Land by the name of *A*, *B*, *C*, and *D*. Master and Wardens of the Craft,

or

or Myſtery of the Cookes of *London*, to *R. D.* for money without naming his Heirs, and the Bargainee enters and levies a Fine, with Proclamations, and five years paſſe. And adjudged that the Corporation ſhall be bound by the Fine, and Non-claime; and therefore the entry and delivery of the Deed of their Leaſe to the Plaintiff as their Deed, by him which had their Letter of Attorney ſo to do, is meerly void. 537.

1. The bargain and ſale was made for the variance of the Indenture from their name of Corporation; for they were incorporate Maſters, and the Indenture is [Maſter] in the ſingular number. And in the Indenture four are named and their Charter Warrants but two Maſters. Alſo the Charter is, Maſters or Governours, and the Indenture Maſters and Guardians. So it varies in Guardians for Governours, and in (*et*) for (*or*) and the words (Craft and myſtery) are ſurpluſage, and therefore void words and do not prejudice the Deed; but for the other variance the Deed was adjudged void: And therefore the bargainee by his entry is a diſſeiſor.

2. The Fine with Proclamations and five yeares barres this Corporation, and all other Corporations, as Mayor and Communalty, Dean and Chapter, Colledges, *&c.* Which have abſolute Eſtates in their own right, and their Succeſſors for ever, by equity of the Statute of 4 *H.* 7. Notwithſtanding, that the Statute ſpeaks onely in particular of Men & their Heirs, yet this Statute is to be taken largely for poſſeſſions of Lands which are to paſſe by the Fine, & ſtrictly againſt the antient right if they be remiſs in their claim for five years; for that the Act ought to remedy all the miſchief; otherwiſe it is of Corporations which have not any abſolute Eſtate 538.

others, as Bishop, Dean, Parson, Vicar, and Prebendary, *&c.* But every one of them shall be barred by Nonclaim by five years; and every succeſſor shall have new five yeares: So every Officer who hath Land apperta ining to his Office, as a Parker, Forrester, Keeper of a Gaol, *&c.* shall be barred of Non-
539. claim after a Fine levied by his Diſſeiſor, and five year paſt after Proclamations, but his Succeſſor shall not be bound, if he do not alſo permit 5 years Paſs in his time.

3 A Corporation cannot be ſeiſed to anothers uſe, but a Natural Body may, becauſe the body incorporate is not impriſonable to be compelled to perform the confidence becauſe they conſiſt of many and the naturall or particular perſons among them ſhall not be impriſoned for the offence of their body Corporate which is another body.

4. A bargain and ſale without the word (Heires) ſhall give a Fee ſimple: But upon thoſe two Points the Court was not reſolved, becauſe that the other two made an end of the Caſe.

vide ante, fol. 135. 6. An authority given by a Corporation to enter into Land, and claime it to their uſe, and after to make a Leaſe of it in their name, is good.

Paramor *against* Yardley.

540. H. 21. El. *in the King Bench Treſpaſs.*

A Termor deviſes all his Terme to his Son, and beſides ſaith, that his will and intent was that his Wife ſhould have the Occupation and Profits of the Land during the Minority of his Sonne, to the intent that ſhe with the Pro-

fits

of it shall educate his Children, and see his ...il performed, and made his Wife his Execu... , and dies; the Wife proves the Testament, ...d educates his Infants accordingly, after sells the ...erme to one, to whom the Testator was indebt... having then sufficient of the Goods and Chat... ...ls of the Testator to pay all his debt, besides the ...id Lease, and after she dies, the Son at his full ... enters, and his Entry was adjudged lawfull, ...d his grant to the Plaintiff good.

1. Because that the devise to the Wife is good ...ring the Minority of the Son, and by the expo... ...ion of the Court, shall be intended to proceed ...e devise to the Son in sense and intent, and the ...vise to the Son, to succeed, 540. 541. *a.*

2. For that the devise of the Profits and Occu... ...ation of the Land, is a devise of the Land it self, ...or that is the benefit and fruit of the Land: other... ...ise it is of the use of a Chattell personall as of a ...Looking-glasse, Mappe, Globe, or Booke; for there ...he use is a distinct thing from the property, *fol.* ...41. *b.* and 541. *a.*

3. For that the Terme shall be executed in the Wife as a Legacy certain, untill she disagrees to it, because it is more for her benefit, and she may not have an action against her self as another may, o... ...therwise it is of a Legacy certain.

1. The Common Law to make the intent of the Parties take effect, puts order to words contained in deeds without order; as the Release of the Dis... ...seisor and Disseisee to the Lessee for years, there the release of the Desseisor shall be first, and after that of the Disseise, otherwise it wanteth privity between him and the Lessee. So Tenant for life Leases for 540.

yeares

years, and afterwards himſelf and his in Reverſion confirms the Eſtate of Leſſee for years, *habendum* in Fee: The Law adjudgeth the Eſtate of the Tenant for life firſt to paſs, for to make privity; upon which Releaſe, that of him in the Reverſion may enure to enlarge the Eſtate. So a Termor for 30 years, and his Leſſee in poſſeſſion for ten years, ſurrender to him in Reverſion, the ſurrender is good as to both Eſtates, but the Leſſee for ten years, by himſelf may not ſurrender for want of privity: And therefore his ſurrender ſhall be taken to ſucceed the other. Land is deviſed to one in Fee after a Rent out of it to another in Fee, good, becauſe it ſhall be taken firſt deviſed, although it be ſubſequent in words.

M. 14. H. 7. *fol.* 2. 341

Vide ante fol. 523.

As the laſt Will repeals the firſt, ſo the laſt part of the Will repeales the firſt part of the Will, which is contrary to it, becauſe he had ſuch intent laſt, As a Deviſe of Land to one in Fee in the Premiſes, and in the end of the Will to another in Fee: But here is not any ſuch contrariety.

2 By grant of the Leaſe, Land paſſeth during the Term, becauſe the Leaſe contains the Land it ſelf, and time in it: words equivalent to words uſual, ſhall have the ſenſe and force of words uſual, as 5 *H.* 7. 1.

M. 5. H. 7. *fol.* 1. 342

Licenſe to enter and occupy Land for one moneth is a Leaſe, and ſo ſhall be pleaded. So that Land ſhall return (*redibit*) or diſcend to a ſtranger after the

the death of Tenant for life, this ſhall be pleaded as a Remainder.

So a grant of the nomination of the Advowſon is in ſubſtance a grant of the Advowſon; becauſe the profit of it reſts in the Nomination.

So here the words of Nomination, (and Profits of the Leaſe,) is as much as the Leaſe it ſelf for the time; but not of diſtinct Profits to take alſo, becauſe the Executor here hath not remedy at the Common Law for the Profits if ſhe be ouſted of it; and for this Legacy, ſhe hath no remedy in the Spirituall Court, becauſe ſhe cannot ſue her ſelf there; alſo the Eſtate it ſelf of the Terme ſhall be in the Wife, becauſe the Son ſhall not have it untill full age, and then might drown his Profit, if ſhe hath but profit to loſe againe after a time.

3. Alteration made by Operation of Law, where [243
the Party hath not any perſon, againſt whom to bring his action, which is equivalent to a Suite and Execution given to a Stranger as of a Remitrer.

So a Debtor of twenty pound is made Executor, he may pay himſelf by way of Retainder, and hath property in the debt it ſelf preſently; becauſe he cannot ſue himſelf, and the Law giveth to him the like advantage as a Suite ſhould, which performes the charge of the thing, whereby he claimes the commodity annexed to the charge; 544.
as to keep Court of a Steward is a diſſeiſen of his

his Fee, For the doing of matter of labour is a claime of the Commodity for his paines; So an Executor which hath a Terme deviſed to him upon Condition that he pay 10 l. to a Stranger, he payes the 10 l. this is conſent and execution of the Legacy. So the educating of the Children here determines her Election, that ſhe taketh the Terme as a Legacy, and her grant after reproves it not, but argues her inconſtancy. If a Termor be indebted to one in a hundred pounds, and maketh his Will, and by it deviſes his Terme to his Son, and leaves aſſets beſides to pay the debt, the Executor cannot ſell the Terme to pay the debt, but ſhall pay it with the aſſets that he hath in his hands; Adjudged becauſe he ought to performe all the Will (*ſcilicet*) Debts and Legacies, if there are aſſets. But the Law gives
345. a greater allowance to them then to others, as if a man deviſe to *A.* 20. l. to *B.* 20. l. and to *C.* 20. l. and makes his Executor and dyes, having goods onely to the value of 20. l. in all, there it is in the election of the executor to which of the three he will pay the 20. l. and if he pay any one, the other may not contradict him although they have no remedy, if there be no more aſſets, & may pay, and carve to himſelf before any other, as it is in 12 *H.* 4. 21. becauſe he is neereſt to himſelf; And therefore the Execution of the Term deviſed here ſhall not be hindered by the not payment of the Legacies to others, nor Leaſe given to his Executor ought to be ſold, and if ſo, then in Legacies it is reaſon that the Executor ſhall have preferment. A gift to his Executor of all his goods for performance of his Will, is no deviſe, and a void gift, becauſe the Law giveth them without theſe words: As if a man deviſe his Land in fee to his Son, and Heire,

it

is voyd, because he shall have it without the devise by discent: So for to prescribe to distrain for Rent service is void, because he may distrain without prescription; A devise of Fee tayle to his Heire is good, because it is another Estate then he should have by discent: So here the Estate devised to the Wife, which is but percell of the Estate (*scilicet*) during the Nonage of the Heire is good, because severed from that which the Law would have given to him, and the Clause for educating his Children is not a thing Testamentary, nor Legacy to the Children, but is an intent annexed to the devise made to the Wife, by which she by her entry hath the Estate devised to her as Legatory; And the Execution to the Wife is also to the Son, because a devise although the Estates are severall, is of the same effect as if her Estate had been devised to another with the Remainder to her Son, and agreement or assent shall not be apportioned; as attornment by Tenant for life to the Grantee of the Reversion for life extends to him in Remainder. So notice given by Tenant for life to the Lord, shall serve to him in Remainder in Fee, to compell the Lord to avow upon him after the death of the Tenant for life: So Rent accepted by an Infant at full age of his Lessee for years hath made good the Remainder over.

An Intruder, cannot gain such Possession against the King, upon which he may maintain an Action of Trespasse, because the King may punish him; 19 E. 4. 2. and he shall not be doubly punished; but against the Lessee of the King, one may gain such Possession, that he may punish a Stranger trespassor, yet he shall not gain any Estate from the Crowne by Freehold, because the freehold irremoveably rests in the Crowne; And the King shall not. 546. M. 19 E. 4. fol. 2.

not alleadge Intrusion with a *continuando*, but divers dayes, *& vicibus*; because he gaineth not any Possession by wrong, (*scilicet*) by the Intrusion against the King.

Walsinghams *Case*.

552. H. 15. El. *in the Exchеq. Intrusion.*

TEnant in tayle of the Kings gift, maketh a Feoffment in fee to a stranger; and after is attainted of Treason, and executed, having issues, and after this attainder is confirmed by Parliament with severall rights and intereſts of Strangers: And it was adjudged that the Feoffee continuing his estate by the Feoffment after the attainder, shall be an Intruder, and this Judgement was afterwards affirmed in a Writ of Error brought in the Exchequer Chamber: But the contrary was adjudged in the Common Pleas, 17 *El.* between *Conway* and *Moulton*, that tenant in tayl shall not forfeit any thing.

Qu.

553 First, That the Feoffment of tenant in tayl had not discontinued, nor devested the estate of fee in Reversion out of the King, because it is but a matter in Deed, which is tortious; otherwise it is of a rightfull matter of Record, as a Recovery upon a good title or rightfull matter in Deed, as a Remitter or Condition performed; As Alienee of tenant in tayle of the gift of a common person infeoffs the King by Deed inrolled, which re-gives to the first tenant in tayle which dyes, the issue enters, it is a Remitter, and therefore the Reversion in fee is devested out of the King, and restored to the first doner, because a former right and matter in Deed and in Law concurr together So Lessee for life to have fee if he doth such an act

aft

ſter the Leſſor grants by Deed inrolled the Reverſion to the King, the Leſſee for life performes the condition, which is older then the title of the King; his older title and matter in Deed, and operation in Law thereupon meeting, ſhall take the Reverſion out of the King, without other Suit or Circumſtance, becauſe bound with the Condition, and the fee ſimple ought to veſt in him at the ſame inſtant that he performes the Condition or never. But no wrongfull act, as Diſſeiſen, Intruſion, *&c.* may take the Reverſion out of the King.

Secondly, That by the Feoffment he hath not given the fee determinable, becauſe he had it not, nor an eſtate for life of the Feoffee, but onely an eſtate for his own life, and ſo the Reverſion in tayle continues in him which ſhall be forfeit by the Attainder, and by conſequence the eſtate of the Feoffee determines by the death of the Feoffor; but the Feoffee hath an eſtate for the life of the Feoffor diſcendable, and his heire ſhall be a ſpeciall occupant of this eſtate in baſe fee-ſimple.

Thirdly, That the King ſhall have the eſtate tayle in point of Reverter, for that he had the pure fee before; and two fees of one thing cannot be together in one perſon (otherwiſe in ſeverall perſons) and then the King ſhall have the Land diſcharged of the eſtate tayle, and by conſequence of all eſtates, charges, and incumbrances, derived out of it, as Leaſes warranted by the Statute, and then the ſaving in the Statute for a thing before determined is void, as of a Leaſe voidable made by ſuch tenant in tayle, which the iſſue hath made good by the acceptance of the rent, and after the eſtate tayle Eſcheated for Treaſon,

or

or is determined for default of iſſue; So that the King hath in point of Reverter there, and the Releaſe ſhall be void, and he hath nothing by the ſaving of the Statute: Adjudged in *Auſtins* Caſe, otherwiſe it is when the King hath it in point of forfeiture, as if the Reverſion be to a ſtranger, *fol.* 559. *b.*

What Livery and Seiſen is, and the validity of it, fol. 554. a.

556. Eſtate tayle ſhall not be in abeyance, nor any thing which another cannot have: for abeyance is onely for the benefit of a ſtranger, becauſe it cannot veſt immediately. 556. *a.* 562. *a.*

557. Eſtates in Fee are there: Firſt, Pure fee: Secondly, Fee determinable: Thirdly, Baſe fee, which ſhall be in one when the pure fee is in another, *fol.* 557. *a.* 558. *a.*

An eſtate tayle ſhall not be to anothers uſe, *fol.* 555. *a.* yet if tenant in tayle bargain and ſels the Land by Deed inrolled, the Bargainee ſhall have fee, executed by the Statute of 27 *H.* 8. which cannot be, except the uſe ſhall be raiſed firſt out of the eſtate taile, and ſo the eſtate tayle ſhall be to another uſe, *fol.* 557. *b.*

18 *E.* 3. A Diſſeiſor or Intruder upon the poſſeſſion of tenant in tayle of the Kings gift gaines not, except the eſtate for life of tenant in tayle, and therefore if he dye ſeiſed, the iſſue in tayle ſhall enter upon this diſcent, as I beleeve, *fol.* 558. *a.*

558 The Father maketh a Leaſe for life to his Son, the Remainder for life to her which ſhall be his Wife at the time of his death: this is a good Remainder,

mainder, and ſhall be in abeyance untill the Wife be known, *fol.* 562. *a.*

Saving in a Statute contrary to the Explanation is void, *Unton* and *Hides* Caſe, and *Auſtins* Caſe of a Leaſe, and the Duke of *Norfolks* Caſe, *fol.* 564. *a.* 562.

The poſſeſſion ſhall be awarded upon a Bill of Intruſion, which is but Treſpaſs in its nature, 561. *a.* 564.

Tenant in tayle grants his eſtate, there waſte is diſpuniſhable, during the life of tenant in tayle, becauſe it is not but onely a priviledge annexed to it. Eſtates paſſe to the Grantee, and amount to words of diſpuniſhable of waſte, and not becauſe he hath a greater eſtate then for the life of tenant in tayle. So 42 *E.* 3. 21. waſte diſpuniſhable in tenant for life (becauſe the Leſſor releaſed all his right that he had in the ſame Land, and that he or his heires would not demand any right in the ſame, nor claime, nor challenge for the terme of the life of the tenant) for that it amounts unto a Leaſe without impeachment of waſte, *fol.* 556. 561. M. 42. E. 3. *fol.* 23. Fitz. waſte. 73.

The Writ of Error abated by the death of the Lord Chancellor, becauſe his Chriſtian name and Sir-name, and Keeper of the great Seale, were put into the Writ, *fol.* 564. *b.* 564.

E. E. M. F.

FINIS.